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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COPY

CALVIN WINSTON JACKSON,

Appellant,

vs.

LEWIS NELSON, Warden,
LIEUTENANT ROGER, and
MR. POWELL, San Quentin Prison,

Appellees.

3472

V. 3472

No. 22308

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALVIN WINSTON JACKSON,

Appellant,

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LEWIS NELSON, Warden,
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MR. POWELL, San Quentin Prison,

Appellees.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's civil action under Title 42, United States Code, section 1983, was conferred by Title 28, United States Code section 1343(3). The jurisdiction of this Court is conferred by Title 28, United States Code section 1291.

STATEMENT OF THE CASE

Appellant, an inmate confined in the California State Prison at San Quentin, initiated an action under the Federal Civil Rights Act, 42 U.S.C. 1983, seeking injunctive relief against the above-named defendants. The gist of appellant's complaint was that he was a victim of a conspiracy on the part of the defendants to deny him constitutional rights of access to the courts. In furtherance of this conspiracy, appellant alleged that defendants withdrew his privilege card, thereby

denying him access to the library so that he could prepare legal documents in civil and criminal matters of which he had an interest. The specific act alleged was that on June 5, 1967, defendants called appellant to disciplinary hearing, took away his privilege card because he on that same date had filed a petition for a writ of certiorari with the Supreme Court of the United States (TR 7).

On August 21, 1967, appellees filed a motion to dismiss pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure on the ground that the complaint failed to state a claim against appellees upon which relief could be granted and on the ground that the complaint was sham and frivolous. (TR 27, 28). Exhibit I, attached to appellee's motion was a certified copy of the Report of Violation of Institutional Rules which detailed the activity of appellant that occurred on June 2, 1967, and which resulted in the disciplinary action. The report recites that appellant refused to work as ordered and also discloses his general attitude toward prison management. The disciplinary report further indicated that appellant actually plead guilty to the charge. This plea of guilty by appellant directly controverts assertions made by appellant in his complaint wherein he stated that he was willing to work but that a job was denied him for no reason. (TR 33).

On August 30, 1967, appellant filed a Notice of Motion to Deny Defendant's Motion to Dismiss and Motion for an Extension of Time and Employment of Counsel (TR 106). On

September 7, 1967, appellant filed an amended complaint and sought relief pursuant to the Fourteenth Amendment to the Constitution of the United States wherein he alleged that he is entitled to release from San Quentin State Prison as long as this instant civil complaint is pending before the court or where any legal petition or proceeding of any nature is pending before any state or federal court. (TR 119).

In an order filed on September 20, 1967, after consideration of the complaint, the Notice of Motion and Memorandum of Points and Authorities submitted by appellees, and other documents and papers submitted to the court by appellant, the court granted appellees' motion and dismissed the action on the ground that the complaint did not state a cause of action against appellees. (TR 123).

SUMMARY OF APPELLANT'S ARGUMENT

The District Court improperly dismissed the complaint.

SUMMARY OF APPELLEE'S ARGUMENT

I. The District Court properly dismissed the complaint as it failed to state a claim against appellees upon which relief can be granted.

II. The dismissal of the complaint is tantamount to an order for summary judgment against appellant.

III. The dismissal of the complaint and amended complaint was proper under Rule 5(a), Federal Rules of Civil Procedure.

IV. Dismissal of a case was proper under Title 28, U.S.C.A. section 1915(d).

ARGUMENT

I

THE DISTRICT COURT PROPERLY
DISMISSED THE COMPLAINT AS IT
FAILED TO STATE A CLAIM AGAINST
APPELLEES UPON WHICH RELIEF
CAN BE GRANTED.

Appellant's complaint that the appellees herein withdrew his privilege card which, among other things, terminated his library privileges does no more than place in issue matters that relate solely to prison management and discipline and consequently does not state a federal issue.

The courts will not interfere in matters of prison administration. Prisoners must endure the inconveniences normally inherent in the orderly operation of a prison. Appellees are under no constitutional obligation to provide law books to prisoners for their use in either civil or criminal litigation in which they may be a party plaintiff or party defendant. Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 862 (1961).

In Roberts v. Peppersack, 256 F.Supp. 415, 433-34 (D. Md. 1966), the court made the following observations:

"The right to petition or correspond with a court does not include a right to be furnished with an extensive collection of legal material. Such a collection either in one's own cell or in the prison library will encourage 'fishing expeditions' in which an inmate seeks out cases where the allegation received favorable consideration

and adopts these allegations as his own . . .

"Prisons are not intended, nor should they be permitted, to serve the purpose of providing inmates with information about methods of securing release therefrom . . ." 256 F.Supp at 433.

In Wagner v. Ragan, 213 F.2d 294 (C.A. 7th Cir. 1954), the court held that a prisoner in a state penitentiary has no right to maintain an action in the federal district court against a warden, alleging that the warden had deprived him of certain rights under the Civil Rights Act, since federal courts do not have the power to control or regulate the ordinary internal management and discipline in prisons operated by the state. Also see Mayberry v. Prasse, 225 F.Supp. 752 (D. Pa. 1963); Walker v. Pate, 356 F.Rptr.2d 502 (7th Cir. 1956).

II

THE DISMISSAL OF THE COMPLAINT IS TANTAMOUNT TO AN ORDER FOR SUMMARY JUDGMENT AGAINST APPELLANT.

Appellant's complaint that the appellees herein withdrew his privilege card because he filed a writ of certiorari with a federal court was challenged and proven untrue in appellee's Motion to Dismiss and Motion for Summary Judgment. The Report of Violation of Institutional Rules filed as Exhibit I with the hereinabove named motions clearly disclosed that disciplinary action was taken against appellant for the following reasons:

"Inmate Jackson, B-852, came to this office today after having been assigned to the Cotton

Textile Mill by the Assignment Lieutenant. The Inmate was interviewed by the Writer and during the interview the Inmate stated that he doesn't have time to be bothered with working at the Cotton Mill or any other industries. Jackson further stated he goes to school four hours at night and fights his case all day; he calls the Mill a mad house; says that Custody is causing forced labor, and that he has two civil complaints in now on the Warden and is willing to write more. Jackson was further counselled but to no avail since he still refused to work in the Mill.

"The Inmate was told that this report would be written and passed to the Yard pending its disposition.

"The Industries' Gate Officer was notified of this report and action." (TR 33).

The report further discloses that on June 5, 1967, appellant entered a plea of guilty to said charges claiming that he is fully scheduled going to school at night and "fighting his case in the day time." (TR 33).

Rule 12(b), Federal Rules of Civil Procedure provides in part as follows:

"Every defense, in law or fact, to a claim for relief in any pleading, . . ., shall be asserted in the responsive pleading thereto if one is required, except that the following defenses

may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, . . ., (6) failure to state a claim upon which relief can be granted . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of a pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"

As demonstrated hereinabove in the instant case, matters outside the pleadings were presented to and not excluded by the District Court, proving the complaint to be sham and frivolous and representing an attempt by appellant to harass appellees. Appellees submit therefore that the dismissal of the complaint by the District Court is tantamount to an order for summary judgment against appellant since no "genuine" issue remained for the trier of the facts. See Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196, 205 (9th Cir. 1950); Koepke v. Fontecchio, 177 F.2d 125, 127 (9th Cir. 1949); Rule 56, Federal Rules of Civil Procedure.

III

THE DISMISSAL OF THE COMPLAINT
AND AMENDED COMPLAINT WAS PROPER
UNDER RULE 5(a), FEDERAL RULES OF
CIVIL PROCEDURE.

The Civil Rights Act is Not a
Substitute for Habeas Corpus.

Rule 5(a), Federal Rules of Civil Procedure requires in part:

"Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint . . . shall be served upon each of the parties."

In appellant's amended complaint he directly seeks release from his confinement in the California State Prison at San Quentin. In part appellant states as grounds for relief certain alleged action taken by the California Adult Authority. The record on appeal clearly demonstrates that appellant did not follow the mandatory and jurisdictional requirements of Rule 5(a) with regard to the Adult Authority or the Department of Corrections.

Furthermore, it should be noted that appellant, in placing in issue the action of the Adult Authority retaining him in prison, seeks to attack the legality of his confinement. Accordingly, his actions should be in habeas corpus, not under the Civil Rights Act to circumvent habeas corpus requirements. DeWitt v. Pail, 366 F.2d 682, 686 (9th Cir. 1966). For this reason too the District Court properly dismissed appellant's amended complaint.

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/

/

IV

DISMISSAL OF A CASE WAS
PROPER UNDER TITLE 28;
U.S.C.A. SECTION 1915(d).

Appellant in his complaint states in part:

"Plaintiff hereby seeks to invoke immediate jurisdiction of this honorable court to contest the constitutionality of certain (hereinafter specified) administrative authority and discriminatory practice, by virtue of which the above named defendants have seize, impound, confiscate, and distroy the personal privileges of plaintiff -- which are essential and vitally necessary for the defense and prosecution of certain legal proceedings presently pending within three United States courts, of which plaintiff is the principle party of interest and is constrained to litigate and prosecute in propria persona . . ." [sic]
(Emphases by appellant.)

Section 1915 provides that any court of the United States may dismiss a case if it is satisfied that the action is frivolous or malicious. This Court in the exercise of its plenary power may dismiss a civil appeal in forma pauperis as frivolous. United States ex rel. Gardner v. Madden, 352 F.2d 792 (9th Cir. 1965). Also see Weaver v. Pate, 326 F.2d 353 (7th Cir. 1963), cert. denied, 84 S.Ct. 795, 376 U.S. 939.

As demonstrated hereinabove, appellant did not favor the District Court with a description of the alleged cases or

defendants he is prosecuting nor the cases in which he is a defendant in the federal courts. On the contrary, Exhibit I of appellee's Motion to Dismiss and Motion for Summary Judgment supports the inference that appellant's complaint and amended complaint are nothing but frivolous and malicious attempts on the part of appellant to harass and undermine prison management. (TR 33).

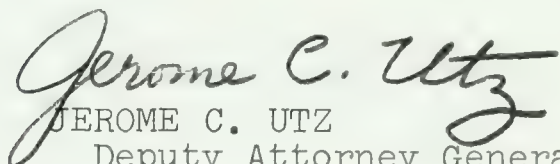
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing appellant's complaint should be affirmed.

DATED: January 11, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

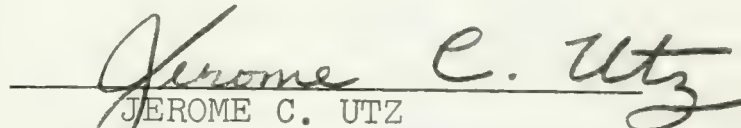

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Deputy Attorney General

Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: January 11, 1968


JEROME C. UTZ
Deputy Attorney General
of the State of California

✓
NO. 22309

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE LEWIS MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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Sections 1291 and 1294

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11

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE LEWIS MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a three-count indictment, following trial by jury ^{1/} [C.T. 91].

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 174.

^{1/}

"C.T." refers to the Clerk's Transcript.

Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all three counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that appellant knowingly imported and brought approximately one ounce of heroin into the United States from Mexico contrary to Title 21, United States Code, Section 174 [C.T. 2].

The second count alleged that appellant entered the United States from Mexico, after having been convicted of Illegal Importation of Narcotics, carrying a penalty of more than one year, without registering with a Customs Official as required in Title 18, United States Code, Section 1407 [C.T. 3].

The third count alleged that appellant did forcibly resist, oppose, impede and interfere with Samuel T. May, a person authorized to make searches and seizures, while May was engaged in the performance of his official duties [C.T. 4].

Jury trial of appellant commenced on June 26, 1967 before United States District Judge James M. Carter. Appellant was found guilty by the jury as charged on Counts One and Two on June 28, 1967 and not guilty as to Count Three [C.T. 44].

Thereafter, on July 5, 1967, appellant was committed to the custody of the Attorney General for ten years upon Count One [C.T. 91]. An information

was filed alleging a prior conviction of Title 21, United States Code, Section 174, which was admitted by appellant [C.T. 91, 92], which served to make ten years the minimum sentence.

Appellant subsequently filed a notice of appeal [C.T. 98].

III

ERROR SPECIFIED

The points specified by appellant on appeal are paraphrased as follows:

1. The possession Instruction should not have been given.
2. The jury was erroneously instructed that a witness is presumed to speak the truth.
3. Government Counsel committed error by repeated reference to appellant's prior felony conviction.
4. The indictment was faulty.

IV

STATEMENT OF THE FACTS

Appellant was released from the Federal Prison, Atlanta, Georgia on January 23, 1967 after serving most of a 5-year sentence for smuggling heroin from Tijuana, B. C., Mexico into San Ysidro, California [R.T. 141-143].^{2/}

On January 26, 1967, just three days later, appellant was arrested

^{2/}

"R.T." refers to Reporter's Transcript.

after escaping from officers who desired to take him into the building where the heroin was found resulting in his prior conviction [R.T. 141-146].

Appellant started running when he was told to go into the office by Samuel T. May, Customs Inspector [R.T. 44-45]. Appellant did not register with Mr. May [R.T. 51].

A short time later appellant was found under an automobile with Exhibit One containing heroin right where his head and hand were under the automobile [R.T. 70-71]. The automobile was very low. Appellant was lying face down, facing the rear wheels. He was squeezed under the vehicle [R.T. 70, 82, 90]. Exhibit One was pushed behind one of the wheels [R.T. 90].

Several officers assisted in the search [R.T. 45].

Appellant admitted to being a user of narcotics before going to prison [R.T. 111]. He admitted he knew he wasn't supposed to go to Mexico [R.T. 120]. Appellant further admitted going to Tijuana, B. C., Mexico, returning to San Ysidro, California and running from the officer when asked to go into the office and hiding under the car [R.T. 125, 127-129, 131, 134].

Appellant admitted he didn't register with Customs Officials upon leaving or re-entering the United States [R.T. 140-141].

Appellant admits his prior conviction was for smuggling heroin through the same port of entry, and through the same pedestrian lane. [R.T. 143].

Appellant had \$90 and a bus ticket to San Diego when he left Atlanta and the probation officer gave him \$365.00 more [R.T. 147-148].

ARGUMENT

I. THE "POSSESSION" INSTRUCTION WAS APPROPRIATELY GIVEN.

The jury must have found actual or constructive possession of Exhibit One, consisting of approximately 3/4-ounce of heroin.

Such possession, actual or constructive, may be proven by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

Viewing the evidence most favorable to the Government, the jury could well have found appellant had the heroin in his hand, and thus find actual possession.

It is undisputed that appellant fled the port of entry and hid under an automobile. The car was very low and appellant was "squeezed" under the car with his head and hands pointing to the rear [R.T. 70, 82, 90].

After he was removed from the hiding place, the heroin was behind the edge of the tire just about where his hands were [R.T. 90].

Appellant denied knowing the heroin was there. This was one of the three limited purposes of admitting proof of the prior conviction, that is to show intent and knowledge.

Appellant seems to contend that since he didn't rely on the defense "that he didn't know it was heroin and he did not know the heroin was imported

contrary to law", the instruction was inappropriate.

The Supreme Court holds the inference applicable to cases where the defendant denies any connection with the drug.

Harris v. United States, 359 U.S. 19 (1959).

Possession, actual or constructive, once proved, substitutes for proof the heroin was imported contrary to law and appellant's knowledge of such illegal importation.

Hernandez v. United States, supra.

The only case cited by appellant, Davis v. United States, 382 F.2d 221 (9th Cir. 1967), on this point is easily distinguished. In that case, the heroin was not found until the next day and the vehicle "had repeatedly been left unlocked and unattended".

Appellant quarrels with Judge Carter's definition of possession. This Court recently approved a similar explanation by Judge Carter. Judge Carter made it clear the jury must find a knowing possession [R.T. 252].

Moody v. United States, 376 F.2d 525 (9th Cir. 1967).

Proof of possession tends to show knowledge.

Eason v. United States, 281 F.2d 818, 820 (9th Cir. 1960);

Evans v. United States, 257 F.2d 128 (9th Cir. 1959);

Arellanes v. United States, 353 F.2d 270 (9th Cir. 1965).

II. AN INSTRUCTION THAT A WITNESS IS PRESUMED TO
SPEAK THE TRUTH DOES NOT REQUIRE REVERSAL IN THIS
CASE.

Judge Carter followed the statement, "a witness is presumed to speak the truth" with a lengthy explanation of the manner in which credibility is judged [R.T. 240-243].

Admittedly no objection was made to this instruction [A.B. 19]^{3/}.
No objection was found in the record. Appellant testified.

The cases relied on by appellant appear distinguishable. An excellent discussion involving most of the cases relied on by appellant is found in United States v. Billoti, 380 F.2d 649, 655 (2nd Cir. 1967).

As contrasted with this case, no explanation of the charge was made in United States v. Persico, 349 F.2d 6, 10-12 (2nd Cir. 1965) and apparently no such explanation was made in United States v. Johnson, 371 F.2d 800, 804-805 (3rd Cir. 1967).

Billoti, supra, at 656, concludes that where an explanation is given, reversible error does not result.

It is further noted that appellant did testify. In Johnson, supra; Billoti, supra; and Meich v. United States, 370 F.2d 768, 773-774 (3rd Cir. 1966) the defendant did not testify.

^{3/}
"A.B." refers to Appellant's Brief.

It has been held, where no objection was made, plain error does not result.

Roviaro v. United States, 379 F.2d 911, 915 (2nd Cir. 1967).

The reason for such a rule is more obvious in this case. Appellant probably desired and benefited by such an instruction.

At any rate, "isolated instances of possible prejudice will not form the basis for reversible error."

United States v. Salley, 360 F.2d 699, 703 (4th Cir. 1966);

Todorow v. United States, 173 F.2d 439, 448 (9th Cir. 1949).

In summary, in order to constitute reversible error, the defendant must not testify, there must be no explanation of the presumption, and an objection must be made.

III. REFERENCES TO APPELLANT'S PRIOR FELONY CONVICTION WAS PROPER.

The prior felony conviction was admitted for three separate and distinct purposes, as follows:

1. Impeachment of appellant after he testified [R.T. 243].
2. As to the issue of intent and knowledge (prior similar Act) [R.T. 245].
3. As to Count Three, failure to register as a prior convicted offender (Title 18 U.S.C. 1407) [R.T. 244].

In discussing the prior conviction, it was carefully limited to these areas in argument by counsel for the appellee.

In addition, failure to register was used as an alibi for appellant.

Appellant's counsel, Mr. Steward, mentioned the conviction in his opening statement, and then proceeds to mention it 9 times in only 6 pages of argument while presumably trying to avoid the issue.

The total argument for the Government was 26 pages in which appellant claims the conviction was mentioned 18 times.

In deciding against a similar contention, Judge Learned Hand said, "To shear him (the prosecutor) of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice "

Dicarlo v. United States, 6 F.2d 364, 368 (2nd Cir. 1925) ,

In this case, no objection was made until all argument was finished.

The Supreme Court says, "It is the duty of the defendant's counsel at once to call the attention of the Court to the objectionable remarks, and request its interposition"

Crumpton v. United States, 138 U.S. 361, 364 (1891).

Otherwise objectionable argument becomes proper when put in issue as in this case. See Rice v. United States, 35 F.2d 689, 695 (2nd Cir. 1928)

Crumpton v. United States, supra;

Malone v. United States, 94 F.2d 281, 288 (7th Cir. 1938);

Ochoa v. United States, 167 F.2d 341, 344 (9th Cir. 1948).

Assuming that some of the argument was outside the bounds of propriety, this alone doesn't necessarily necessitate a reversal.

United States v. Socony-Vacuum Oil Co., 150 U.S. 239 (1940).

Only a weak case, where prejudice to the accused is so highly probable constitutes reversible error.

Berger v. United States, 295 U. S. 78 (1935).

The record, in this case, reflects overwhelming evidence against appellant.

The error, if any, was cured by the charge to the jury.

IV. COUNT ONE OF THE INDICTMENT WAS SUFFICIENT.

Appellant contends that Count One does not state an offense since it does not allege knowingly and fraudulently. The indictment alleges knowingly only.

The Statute (21 U. S. C. 174) uses the term knowingly or fraudulently. It would appear that the charge may be either depending on the facts. It is noted the indictment incorporates the language of 21 U. S. C. 173 by reference as follows:

"Contrary to Title 21, United States Code, Section 173."

That section provides,

"It is unlawful to import or bring any narcotic drug into the United States; except None of the exceptions include heroin."

Appellant claims no prejudice, but prefers, apparently, to rely on what he claims to be a technical defect and further claims the common law applies.

Rule 7(c) Federal Rules of Criminal Procedure has eliminated both the technical niceties and the common law application to indictments.

The still leading case on questions involving sufficiency of the indictment is Hagner v. United States, 285 U. S. 427 (1931).

In that case, the Court at 431 made an often repeated statement:

"The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects not prejudicial, will be disregarded."

The Hagner case put considerable weight to statute of similar wording to Section 7(c) of the Federal Rules of Criminal Procedure which requires prejudice.

The Court said, at 433,

"Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form or by fair construction can be found within the terms of the indictment."

Similar reasoning is found in the following cases:

Stein v. United States, 313 F.2d 518, 520 (9th Cir. 1962);

Heaton v. United States, 353 F.2d 288, 292 (9th Cir. 1965);

Medrano v. United States, 285 F.2d 23, 26 (9th Cir. 1960), cert.

denied, 366 U. S. 968;

Shafer v. United States, 179 F.2d 929, 930 (9th Cir. 1950).

As in this case, provisions of the statute may be included by reference.

Palomino v. United States, 318 F.2d 613, 615-616 (9th Cir. 1963);

Stein v. United States, supra, at 520.

Stein involved a similar reference to 21 U. S. C. 173. The Court there placed emphasis on the provision in 173 that heroin may not be imported legally.

It is contended, therefore, since heroin is involved, the indictment need only allege knowingly.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

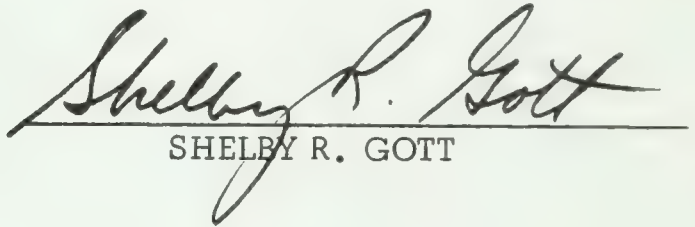
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Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


SHELBY R. GOTT

NO. 22311 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFTON BERT CRAFT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

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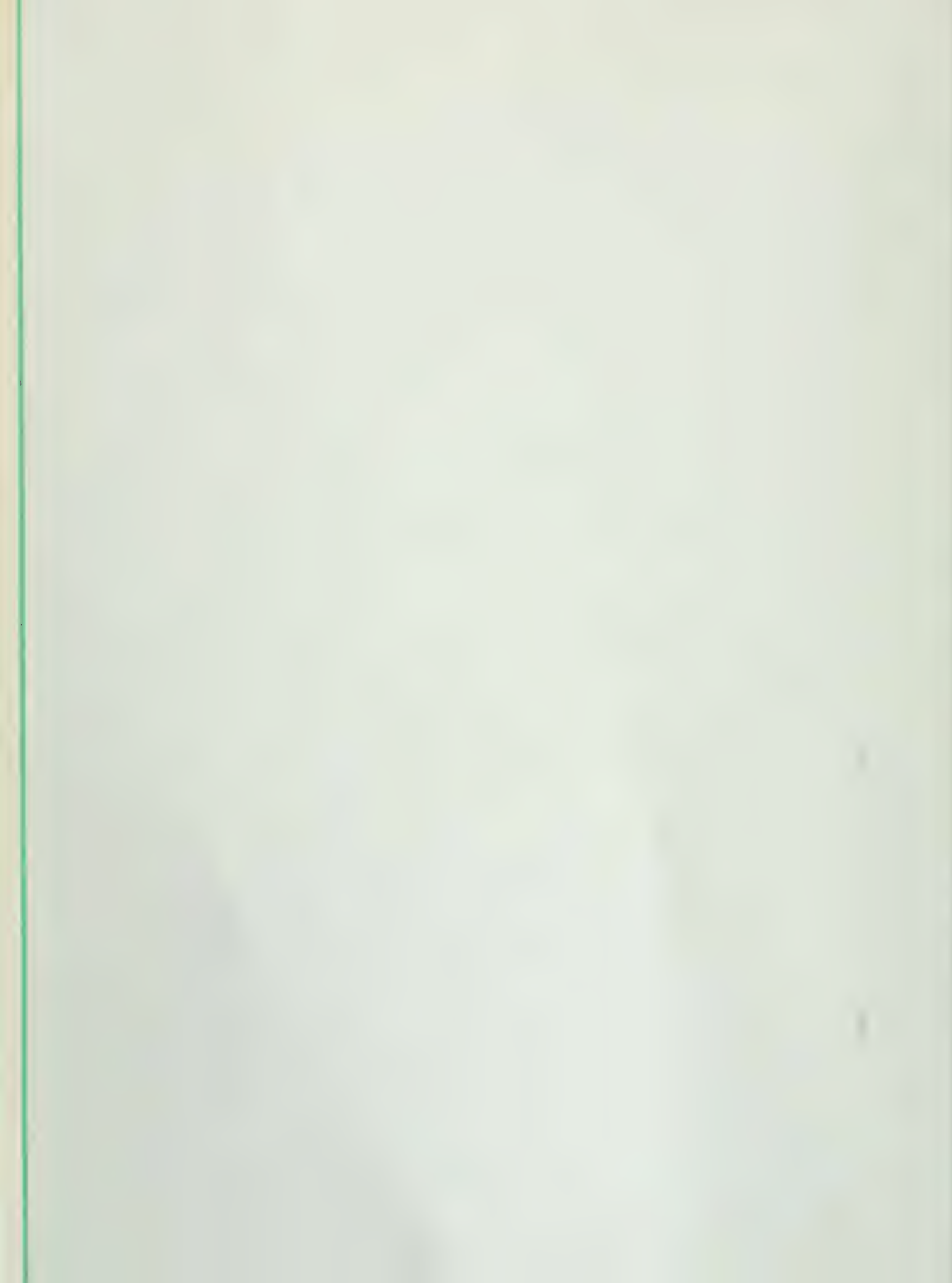
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFTON BERT CRAFT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I.

STATEMENT OF THE PLEADINGS

AND FACTS DISCLOSING JURISDICTION

On November 22, 1966, the federal grand jury for the Southern District of California returned a three-count indictment (No. 172-SD) charging Larry L. Wolfe and Eleanor Rebecca Orman in Count One with a violation of Title 21, United States Code, Section 176(a) (illegal importation of marihuana) and charging Steven Roy Horn and appellant with a violation of Title 21, United States Code, Section 176(a) (illegal importation of marihuana) through a violation of Title 18, United States Code, Section 2 (aiding and abetting the illegal importation of marihuana). Count Two charged Larry L. Wolfe, Eleanor Rebecca Orman, Steve Roy Horn and appellant with a violation of Title 21,

United States Code, Section 176(a) (concealment and transportation of illegally imported marihuana). Count Three charged Larry L. Wolfe, Eleanor Rebecca Orman, Steve Roy Horn and appellant with a violation of Title 18, United States Code, Section 545 (illegal importation of merchandise). Transcript of Record, Vol. 1, pp. 2-4.

On May 18, 1967 a trial by jury commenced as to appellant and defendant Steve Roy Horn. On May 22, 1967 the jury returned a verdict of guilty on each count as to both appellant and Steve Roy Horn. Id. at 5.

On June 19, 1967 appellant was sentenced by the Honorable James M. Carter to a 5-year period of incarceration on each count concurrently, and pursuant to Title 18, United States Code, Section 4208(a)(2), and further recommended that the place of confinement of appellant be designated by the Attorney General to be the State Institution where appellant was confined at that time. Id. at 6. A timely Notice of Appeal was filed by appellant. Id. at 7.

The offenses occurred in the Southern District of California, and jurisdiction of the United States District Court for the Southern District of California was based on Title 21, United States Code, Section 176(a), and on Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as

follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. . ."

Title 18, United States Code, Section 545, reads in pertinent part as follows:

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented

1. Was testimony that a vehicle similar to the one in which the contraband was found on "lookout" inadmissible hearsay, and prejudicial to appellant who was not in the vehicle at the time of the search of the vehicle?
2. Were the exculpatory statements, later shown to be false, made by appellant to Customs Agent Thaine Ellis taken in violation of Miranda?

3. Was the testimony relating to appellant's prior sale of dangerous drugs admissible?
4. Was the testimony of appellant's prior use of marihuana inadmissible?
5. Was the testimony of appellant's having smuggled dangerous drugs into the United States from Mexico inadmissible?
6. Was the introduction into evidence by appellant of his prior felony conviction error?
7. Was the evidence sufficient to sustain the verdict as to appellant?

A. Statement of the Facts

On October 16, 1966, Immigrant Inspector Tom Acuna was on duty inspecting vehicular traffic entering the United States from Mexico at the Port of Entry, San Ysidro (San Diego), California at approximately 3:45 a.m. At that time and place, Larry Wolfe and Eleanor Rebecca Orman entered the United States from Mexico in a red 1961 Ford, with a license number of OAE-731. Acuna had a "lookout" list containing the license number OEA-731, so he referred the vehicle to the secondary inspection area for further inspection. Reporter's Transcript, pp. 16-17 (hereinafter referred to as R.T.).

On October 16, 1966, Customs Inspector Claude L. Yates was on duty inspecting pedestrian traffic entering the United States from Mexico at the Port of Entry, San Ysidro (San Diego), California at approximately 3:40 a.m. At that time and place, he observed appellant enter the United States from



Mexico. Appellant was nervous, id. at 20, and Yates thought it "unusual" for an American to be entering at that hour. Appellant stated to Yates he had been with some friends, and had become separated from them, and was returning home on foot.

Four or five pedestrians later Yates observed Horn entered the United States from Mexico. He also was nervous and under quite a bit of tension. Id. at 21. He also stated that he had been with friends in Mexico in a car, and had become separated from them. Id. at 19-22.

On October 16, 1966 Customs Inspector Robert L. Lasher was on duty at the secondary inspection area at the Port of Entry, San Ysidro (San Diego), California inspecting vehicles referred to that area for further inspection. At approximately 3:50 a.m. a red 1951 Ford Fairlane arrived at that area with Wolfe and Orman as passengers. A slip on the car indicated that the car was similar to one on "lookout." Lasher checked the license number and description of the vehicle in question with the "lookout" book, and determined sufficient similarity existed to warrant a further search. The checking the license number and description of the subject vehicle with the lookout book was evidence admitted without any objection. Id. at 30.

Lasher found three bricks of marihuana and three switch-blade knives under the back seat of the vehicle. Id. at 28-31.

On October 16, 1966 Customs Agent Thaine Ellis was on duty at the Port of Entry, San Ysidro (San Diego), California in the early morning. At that time and in that place, Wolfe pointed out appellant and Horn to Agent Ellis. Ellis



intercepted appellant and Horn near the Greyhound Bus Station in San Ysidro, and returned them to the Port of Entry. He advised appellant that he did not have to make any statement to him; that any statement he did make could be used hereafter against him in any court proceedings; that he was entitled to an attorney during that interrogation or any subsequent interrogation; and that if he could not afford an attorney, the government would appoint one for him. Id. at 37.

After being so advised, appellant denied knowing Wolfe, said that he had never seen Wolfe. Id. at 38. Later, appellant admitted knowing Wolfe. Id. Appellant also admitted traveling from Los Angeles to Mexico with Wolfe, and having departed from Wolfe's automobile prior to its entry back into the United States from Mexico. Id. at 39. Appellant had previously denied knowing Wolfe and/or Orman twice. Id. at 42.

Larry Wolfe, a co-defendant, testified on behalf of the government. Wolfe and appellant worked at the same company, id. at 54, and Wolfe had known appellant for about a week. Id. at 54, 70. In the middle of October, 1966, appellant, Horn, Wolfe and Orman decided to take a trip to Mexico. Id. at 57-58. The purpose of the trip was for appellant to purchase some amphetamine sulphate tablets for Wolfe, and some stag movies, and a false driver's license for Orman. Id. at 58. Wolfe wanted some "bennies" to keep him awake, id. at 56, as he was working two jobs, and needed the pills to keep him awake. Id. at 55. Appellant had previously sold Wolfe a "roll of whites," id. at 56, said sale occurring within a week of the trip to Mexico,

as that period of time marked the entire relationship between Wolfe and appellant. Id. at 54,70.

All four parties travelled to Mexico, and appellant and Horn left Wolfe's and Orman's presence to secure the contraband. Id. at 57, 59. Wolfe and Orman gave appellant money for this purpose. Id. at 59. After a period of time, about an hour, id. at 60, appellant and Horn returned and appellant indicated that he had the "stuff." Id. at 61. The four parties returned to the vehicle, and entered it and started for the border. Id. at 63. Appellant and Horn exited the vehicle about three blocks from the border, id. at 65, appellant indicating that it would not look as suspicious. Id. at 64. Appellant stated that he and Horn would meet Wolfe and Orman at Oscar's on the American side of the border. Id. at 65.

Wolfe testified that he had seen or heard that appellant used marihuana, such as smoking. Id. at 66.

Wolfe further testified that he had observed appellant remove pills from the coat that he had worn to Mexico, and swallow some himself, and give some to Horn who swallowed them also. Id. at 67-68. This event occurred the day that Wolfe, Horn and appellant were released from custody, the day after the arrest. Id. at 66. Appellant stated on that occasion that "the Customs officer was kind of stupid because he [appellant] got by him with having some pills in his coat and they didn't catch him with the pills." Id. at 69.

Wolfe further testified that appellant had told him that they would "get

he later" if he said anything. Id. at 52. When Wolfe and appellant were at the jail after they had been arrested, appellant told Wolfe if all male parties testified against Orman, the males would "get out easier." Id. at 54.

Orman testified also the same facts regarding the trip to Mexico, and the events that occurred there up to the time that she and Wolfe were apprehended entering the United States from Mexico. Id. at 87-99.

IV.

ARGUMENT

A. THE TESTIMONY REGARDING A "LOOKOUT" WAS NOT HEARSAY, WAS RELEVANT, AND WAS CERTAINLY NOT PREJUDICIAL.

The references in the testimony of Acuna and Lasher to the fact that the vehicle in question had a license number similar to, but not coincidental with, a license number which was on "lookout" was not hearsay. A witness is permitted to testify as to the things he did and observed. Thus, if a witness made a phone call, and testifies that he inquired on a specific matter ("What is the telephone number of Joe's Bar?"), and then testifies that he wrote down on a piece of paper certain figures ("After the other party said something, I wrote down '298-5478.'"), it is reasonable to infer that the text of the statement of the other party related to what the witness wrote down. Drawing that conclusion does not prevent the witness from testifying as to what he said and did. There has been no testimony directly on any extrajudicial statement by anyone.

Appellant cites no authority to support his proposition that this evidence

is hearsay and inadmissible as such.

Second, the evidence was that the number on the "lookout" list was not exactly as the number of the vehicle in question. The letters before the numerals on the "lookout" were "OEA" and the vehicle's were "OAE." Id. at 17. Both Acuna and Lasher testified as to the similarity, id. at 17, 30, and that the similarity was the cause for a further search of the vehicle. Id. The similarity did justify the further search, but the dissimilarity establishes the absence of any prejudice to appellant. The matter was relevant to explain why the vehicle was pulled over for further customs inspection. However, because the "lookout" referred to a different license, the testimony relating to the "lookout" was not prejudicial. The jury could have inferred that another vehicle was in fact involved, but it was pure chance that this similar number was pulled over and contraband found. An honest mistake by the customs officials resulting in the discovery of contraband cannot fairly be objected to in explaining the search of that car.

Moreover, appellant was not in the vehicle when it was stopped because of its similarity to the "lookout" number. Id. at 20. Appellant's involvement came upon Wolfe's identification of appellant to Agent Ellis. Id. at 35. There is no direct causal relationship between the "lookout" and appellant. Only the independent intervening force of Wolfe resulted in appellant's apprehension. Therefore, appellant cannot complain of the evidence relating to the "lookout."

Appellant argues that effect of mentioning the "lookout" was the "implication that contraband was believed by an undisclosed informant to be in this

automobile." Appellant's Brief, p. 14. As suggested above, the dissimilarity makes for inferences which do not support any claim of prejudice, but merely a matter of fortune.

There was considerable evidence that appellant was responsible for the presence of the contraband in the car. Wolfe and Orman testified that appellant indicated that he secured the "stuff" in Mexico, R.T., pp. 61, 95. Appellant solely had the keys to the car and the parking ticket in Mexico, id. at 59, 62. Whatever effect the testimony regarding the "lookout" might have had to indicate contraband was in the car was merely cumulative, and thus not prejudicial.

Finally, appellant had the opportunity to vitiate any harmful inference that might have attached from the testimony regarding a "lookout." In a discussion out of the presence of the jury, appellant's counsel stated he was "considering the possibility of introducing [evidence through] Agent Ellis [as] to that lookout, which would have an exonerating effect." Id. at 122. He added that he realized "the dangers in doing this;" Id. To this suggestion, the government indicated its willingness to stipulate that "an unnamed informant . . . observed the car bearing a similar license number go to a known dope peddler in Tijuana and that at that time the car was observed being driven by two young Mexican males within two hours of when this car crossed the border." Id. at 123. To this suggested stipulation, counsel for appellant said "that would probably do it, your Honor. This waives the first person I would call to testify." Id. Although appellant's counsel did not commit himself to use of

this stipulation, he understood that it would be available to him. Id. at 123-24.

Thus, appellee offered appellant the opportunity to vitiate any claimed prejudicial effect of the testimony relating to a "lookout" by offering a stipulation that appellant was never seen in or near the car, whose license number was on "lookout" when that information was secured. In fact, the stipulation implicated other unknown parties, and had, as counsel for appellant realized, an "exonerating" aspect for appellant. However, as the record indicates, appellant, for unknown reasons relating to strategy of trying the case, elected not to take advantage of the generous offer by appellee. It is quite difficult for appellee to visualize the nature of appellant's complaint on appeal on this matter in view of what occurred in the trial court.

Appellant cites only one case on this question, that is Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961) in support of his position. Sanchez is clearly distinguishable. That case is replete with quotations from the record indicating the clearly inadmissible hearsay testimony. All of the objectionable testimony related to testimony by a witness of what other people said, their actual extrajudicial statements. Id. at 262-65. The facts there are most distinguishable from those here, in which there was no testimony as to the nature of the information received resulting in the placing of a vehicle on "lookout."

B. STATEMENTS MADE BY APPELLANT AFTER BEING ADVISED OF HIS CONSTITUTIONAL RIGHTS WERE NOT MADE IN VIOLATION OF MIRANDA.

Appellant first argues that there is no showing the appellant "voluntarily, understandingly and intelligently waives his constitutional protection against self-incrimination and his right to have counsel present at this interview." Appellant's Brief, pp. 15, 17. The record is clear to the contrary. At the Port of Entry, appellant was orally advised as follows:

"Do you understand your Constitutional rights? . . . I want to explain those to you. You don't have to make any statement to me. Any statement you do make can be used hereafter against you in any court proceedings. You are also entitled to an attorney. [Sic.] [D]uring this conversation or during any other interrogation[.] [I]f you can't afford an attorney, the government will appoint one for you." R.T., p. 5.

Furthermore, appellant was given a document which he signed. Id. at 6. This document was admitted into evidence on motion of appellant. Id. at 191. The document read as follows:

"We are investigating marihuana smuggling. You do not have to make any statement or answer any questions. Any statement you make could be used against you in a court of law. You have a right to remain silent. Do you understand what I have told you? You have the right to consult with an attorney before making any

statement or answering any questions. You have the right to have an attorney present with you during the making of any statement or the answering of any questions. Do you want counsel, or are you willing to give up your right to remain silent and talk to us without consulting a lawyer and having one present during the making of your statement?" Id. at 6-7.

Appellant signed this document. Id. at 7. Appellant said that he understood what had been told to him in response to those questions in the document, first by so stating, and the second time by nodding his head affirmatively. Id. at 10-11.

Appellant himself acknowledged on cross-examination that he read the document and signed it. Id. at 181.

Bell v. United States, 382 F.2d 985 (9th Cir. 1967) settles the issue of the waiver of the rights adversely to appellant. In that case, defendant was given written advice as to his rights. He was not given oral advice. In response to the argument that defendant should have been given oral advice, the court said at 987:

"This is absurd. If appellant read and understood the written advice, then he acquired knowledge of his rights in a very satisfactory way. There is no requirement as to the precise manner in which police communicate the required warnings to one suspected of crime. The requirement is that the police fully advise such a person of his rights, and appellant made no showing

that he did not read or understand the written warnings which were presented to him."

Appellant in the case at bar made no showing that he did not read or understand his rights. In fact, the contrary is true. He said that he did read and understand them. Moreover, the present case is stronger because appellant had the benefit of both oral and written communications, and not just written as in Bell.

Next, appellant argues that the Miranda warning as given was defective because appellant was not advised that the statements he might make "will be used" against him. Appellant's Brief, p. 18. The language actually used was that the statements made "can be used hereafter against you in any court proceedings," R.T., p.5, and "could be used against you in a court of law." Id. at 6. Appellee submits that the issue should not turn on the semantics of the situation. The question is whether or not appellant understood that statements he made would in the future be used to his disadvantage and detriment in a legal proceeding. It is submitted that the language used grammatically referred to the future, and left no uncertainty as to the consequences of his making statements at that time.

To the benefit of appellant, the court instructed the jury that it should view oral admissions and incriminating statements made out of court with caution and weighed with great care. Id. at 210, 214. The court instructed the jury to determine if the statements were "voluntarily and understandingly" made. Id. at 210-211. Finally the court instructed the jury to consider the

statements made only after they found that he had been informed on his constitutional rights as outlined in Miranda, including that he knew that "anything he said could be used against him," Id. at 213. The jury was instructed to find that appellant knowingly and understandingly waived his right to have an attorney present at the interview before the jury could consider the statements made. Id. at 213-14.

C. TESTIMONY OF APPELLANT'S PRIOR ACTIVITIES INVOLVING
BENZADRINE, MARIHUANA AND OTHER UNIDENTIFIED PILLS
WAS RELEVANT, AND THE TRIAL JUDGE'S EXERCISE OF HIS
DISCRETION AS TO THE RELEVANCY AGAINST ANY PREJUDICE
SHOULD NOT BE DISTURBED.

Appellant accepts the statement of law cited by appellant, that evidence of offenses or misconduct not charged in the indictment is inadmissible unless relevant. Appellant's Brief, pp. 20-21. Appellee also accepts the proposition that the relevancy of the evidence is to be weighed in its probative value against its prejudicial effect. Id. at 21. Appellee further contends that the trial court's determination on the issue is one within his discretion, and the exercise of that discretion should not be reversed on appeal unless clearly erroneous. Rule 52(a), Federal Rules of Criminal Procedure. See e.g., Banning v. United States, 130 F.2d 330 (6th Cir. 1942).

1. Previous Sale of Benzadrine

Appellant blandly states that "the Government did not specify its purpose

in introducing this evidence." Appellant's Brief, p. 21. The record is clear that the purpose of introducing that evidence went to the issue of "intent to defraud," an essential element of the government's case. The trial court noted in its instructions that this element was necessary to prove each count of the indictment. R.T., pp. 219, 220, 221. The court also rendered an instruction of the meaning of "intent to defraud." Id. at 221-22.

In establishing the "intent to defraud" element, it was necessary to prove that appellant had such an intent. Proof came first from the fact that the purpose of the trip to Mexico was to purchase amphetamine sulphate tablets, and smuggle them into the United States from Mexico with an "intent to defraud." Id. at 58, 91. The reason behind Wolfe's desire for appellant to obtain some amphetamine sulphate tablets thus became important. Wolfe testified that he wanted them in order for him to stay awake on his job, as he was trying to work two jobs at the same time. Id. at 55, 56. He explained appellant's presence and purpose of the trip to Mexico to smuggle merchandise into the United States resulted from the fact that on a previous occasion, within one week before the trip, appellant revealed that he was a source of supply of such pills, as he had sold a "roll of whites" to Wolfe. Id. at 56.

Thus, the purpose of the trip to Mexico involved the essential element of "intent to defraud." The evidence was admitted to relevantly explain appellant's presence and participation in the venture. Because of the relevance of the evidence on the issue of the purpose of the trip to Mexico, appellee submits that the trial court's ruling that such evidence of prior misconduct was of sufficient probative value to outweigh its prejudicial effect should not be

disturbed as it is not clearly erroneous.

Furthermore, Count Three of the indictment charged appellant with smuggling merchandise into the United States from Mexico with "intent to defraud." The fact that pills were the stated merchandise, the evidence relating to the use of those pills was clearly admissible.

Appellant cites the case of Enriques v. United States, 314 F.2d 703 (9th Cir. 1963), as authority for holding this prior sale to be inadmissible. However, Enriques is distinguishable. Evidence of a prior use of marihuana was held erroneously admitted with regard to a charge of sale, concealment and transportation of heroin. However, there was no suggestion of any causal relationship between the incidents. In our case, the contrary is true. The explanation of appellant's presence in Mexico and his entry into the United States related to his "intent to defraud" the United States by smuggling contraband. The prior sale went to establish appellant's presence with Wolfe on the trip.

The relevancy of the prior sale is heightened by the evidence that appellant did in fact smuggle pills into the United States from Mexico at the time that he crossed the border, although this fact was undetected by the Customs officials at that time. R.T., pp. 67-69.

2. Concealment and Use of Unidentified Pills.

Appellant, upon his release from County Jail removed some pills from the coat which he had worn to Mexico, swallowed them, and stated that "the Customs officer was kind of stupid because he got by him having some pills

in his coat and they didn't catch him with the pills." Id. at 69.

Appellant only cites Enriques again to support a ban on that evidence. Its facts are obviously different. Here there are two counts of smuggling contraband into the United States and one count involving concealment and transportation of illegally imported contraband. All three counts involve "intent to defraud." Nothing could go more to that issue than appellant's admission of having participated in a simultaneous act, neither prior nor subsequent, of the exact same nature.

The comment regarding the Customs officer was not ambiguous in any sense. It related to evasion of the customs law, plain and simple.

3. Previous Association with Marihuana.

Interestingly enough, appellant states that "Wolfe testified in effect that appellant previously smoked marihuana." Appellant's Brief, p. 23. It is extremely important for this Court to know why appellant qualified this description of the testimony with the words "in effect." The reason is that the record does not reflect testimony that appellant had smoked marihuana in the past.

The whole colloquy which occurred at this point in the trial is set forth as follows:

"Mr. Milchen: Do you know of your own personal knowledge whether or not the defendant, Craft, has ever used marijuana, [sic.] of your own personal knowledge?

Mr. Reese: I object to that, that is irrelevant to this case.

The Court: Objection overruled.

Mr. Milchen: I asked you of your own personal knowledge what you have seen or heard?

Mr. Wolfe: Say that again.

Mr. Milchen: Have you ever seen or heard of anything of your own personal knowledge that Mr. Craft, the defendant, Craft, used marijuana [sic]; such as smoking?

Mr. Wolfe: Yes." R.T., p. 66.

Appellee went no further into the matter.

As is evident, it is unclear whether the affirmative response meant that Wolfe had seen appellant use marihuana or whether Wolfe had heard (which would be hearsay) that appellant used marihuana. If the response was the latter, the prior objection on the grounds of relevancy would not have preserved this point on appeal. Rule 18(2)(d), Rules of the Court of Appeals for the Ninth Circuit.

Assuming that the response related to use and that the objection preserved that point on appeal, appellee submits that the evidence was relevant to the case. Appellant was charged with "knowingly" smuggling marihuana into the United States, and "knowingly" transporting and concealing it in the United States. Appellant's not guilty plea put in issue the question of his knowledge of the marihuana. Appellant testified that Wolfe gave him the package

containing the marihuana prior to his departure from the vehicle. R.T., p.

141. Appellant "wondered what was in the package first." Id. He thought the package contained firecrackers. Id. at 142.

Appellant's prior use of marihuana went to the issue of whether or not he knew what was contained in those packages.

However, it is conceded that the prior use of marihuana was introduced in the government's case in chief, and not in rebuttal of appellant's testimony as to his lack of knowledge. Even so, appellee submits that the not guilty plea by appellant made the issue of his knowledge of the nature of marihuana a matter of importance, and evidence of such prior knowledge was relevant.

That the government had to prove knowledge is revealed by the instructions of the court on numerous occasions. Id. at 215, 216, 217, 219, 220, 221, 223.

The fact that appellant had previously used marihuana, and within one week of the smuggling venture (Wolfe had known appellant only one week prior to the trip. Id. at 54, 70) does logically suggest that appellant might resort to smuggling an amount of marihuana into the United States for his personal use. The marihuana in question was only three bricks, approximately seven pounds. Transcript of Record, Vol. I, pp. 2-3. The quantity of marihuana suggests that it was for personal use, and evidence of personal use would be relevant. This fact remains even though marihuana may be grown in the United States.

This fact is more relevant when viewed in light of the case cited by

appellant of Theobald v. United States, 371 F.2d 769 (9th Cir. 1967). There, evidence of a discussion about sale of marihuana was held admissible in connection with a charge of smuggling a commercial quantity of marihuana, to wit, 44 pounds. In our case, the prior personal use would go to the issue of knowingly smuggling a quantity of seven pounds, a quantity for personal use. The amount provides as much relevant motive for smuggling here with the prior act as it did in Theobald and that prior act.

Appellee finally submits that the evidence in question was merely cumulative. Therefore, whatever prejudicial effect it might have had was rendered null. Any error as a result is harmless. Appellant admits the truth of this argument when he states as follows:

"It is difficult to understand why it should have been necessary for the Government to attempt to establish knowledge on the part of the appellant, and absence of mistake, in connection with the importation of the marijuana [sic] here involved, if WOLFE'S and ORMAN'S testimony was to be believed. There was little necessity for additional proof of knowledge, intent to evade Customs laws, or absence of mistake, in view of WOLFE'S claim that appellant deliberately got out of the car for the purpose of reducing suspicion and earlier in the evening had commented on the problem of trusting a supplier with whom he was not acquainted." (Emphasis added.)
Appellant's Brief, p. 27.

Appellee would agree whole-heartedly with appellant that the evidence

was merely cumulative. There is no doubt that the evidence must be viewed in the light most favorable to appellee. Viewing the evidence in such a light, the testimony of Wolfe and Orman is to be believed, and the evidence was cumulative, thus vitiating any prejudicial effect and being harmless.

D. INSTRUCTIONS CURED ANY ERROR RESULTING FROM ADMISSION
INTO EVIDENCE OF ANY OF THE SIMILAR ACTS.

The court instructed the jury on the issue of similar acts as follows:

"Evidence that an act was done at one time or on one occasion is not any proof whatever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.

"Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment then under deliberation.

"If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining

the state of mind or intent with which the accused did the acts charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the particular count under determination, the accused acted willfully and with specific intent and not because of mistake or inadvertence [sic] or other innocent reason." R.T., pp. 214-15.

It is submitted that this instruction cured any prejudicial effect upon appellant from the introduction of evidence of the similar acts in question. The instruction gives the correct scope of consideration by the jury of the evidence. This instruction was not objected to by appellant, nor was any additional instruction offered on the subject.

E. THERE WAS NO ERROR IN THE INTRODUCTION BY APPELLANT
OF HIS PRIOR FELONY CONVICTION.

Appellant introduced evidence in his case in chief to the effect that he had been previously convicted of a felony. Id. at 159. The simple fact of the prior felony conviction was the only fact in evidence. The nature of the conviction and its date were not introduced into evidence. Appellee never went into the matter on cross-examination. Id. at 160-193.

There is no authority to support the proposition that appellant can complain on appeal of matters he introduced into evidence, regardless of the

strategical reasons.

There is authority too numerous to require citation that the existence of a prior felony conviction, including even the date and nature of the conviction, can be used to impeach the accused.

The court, in the instructions, directed the jury to consider the prior felony conviction insofar as it related to the credibility of appellant, and not as evidence of guilt of the offense for which appellant was on trial. Id. at 211-12.

V.

CONCLUSION

Appellee respectfully submits that appellant's conviction should be affirmed.

Respectfully submitted,

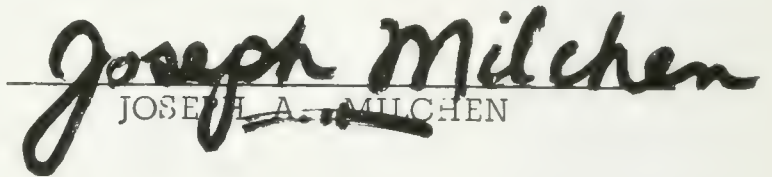
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JOSEPH A. MILCHEN

No. 22312

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD M. CLARIDGE AND KAY T. CLARIDGE,
his wife, et al.

and

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Appellants

v.

THE UNITED STATES OF AMERICA
Appellee

**Appeal From The United States District Court
For The District Of Arizona**

Joint Brief For Appellants

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STATE OF ARIZONA, EX REL., OBED M. LASSEN
Appellants

v.

THE UNITED STATES OF AMERICA
Appellee

**Appeal From The United States District Court
For The District Of Arizona**

Joint Brief For Appellants

JURISDICTIONAL STATEMENT

This is an interlocutory appeal from an order entered on November 4, 1966, by the United States District Court for the District of Arizona, Judge Walter E. Craig holding that the defendants and intervenors have no right, title, interest, claim or demand to the lands in question (R.107-116). The underlying action was brought by the United States to enjoin the defendants from interfering with the plaintiff and its contractor's use of an access road across land occupied

by the defendants, to quiet title in the United States to the lands in question, to eject the defendants from the subject land and for damages for past use and occupation of the lands involved. The District Court's jurisdiction was invoked under 28 U.S.C. 1345 (R. 1). The District Court's order of September 25, 1967, certified that it was of the opinion that the order involves questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal therefrom may materially advance the ultimate determination of this and other litigation (R.117-118). The defendants and intervenors on October 6, 1967, filed in this court a timely Application for Appeal under 28 U.S.C. 1292 (b), which was granted on October 31, 1967 (R. 129). This court's jurisdiction accordingly rests upon 28 U.S.C. 1292 (b).

STATEMENT OF CASE

This is an action instituted by the United States to enjoin the defendants from interfering with the plaintiff's and its contractor's use of an access road across land occupied by the defendants, to quiet title in the United States to lands in question, to eject the defendants from the subject land and for damages for past use and occupation of the land by the defendants (R.1-8).

The lands involved in this action are located in the Palo Verde Valley, approximately one and one-half miles south of Ehrenberg, Arizona, on the Arizona side of the present Colorado River channel in Sections 22, 27, 28 and 33 in Township 3 North, Range 22 West, G&SRB&M (R.107). A portion of Lot 3 of Section 28

abuts the present flow channel of the river. The defendants, Edward M. Claridge, et al. have occupied the land for many years and carried on an agricultural operation on said land (R.61). This operation has included clearing and levelling of land, construction of roads and the erection of fences and other improvements upon the land. Prior to the defendants occupation of this land, it had been occupied and farmed by various other persons for several years. These defendants paid for the land and received a quit claim deed as evidence of right to the land.

The Colorado River valley in the area of the subject land is bounded on the east by a sharp rise in elevation located approximately on the north-south center line of Sections 22 and 27 of Township 3 North, Range 22 West, G&SRB&M, Arizona. This sharp rise forms the approximate eastern boundary of the subject land (Exhibit KK-2, Plate 1). The characteristics of the land and the vegetation thereon at the base of this sharp rise differ completely from the characteristics of the land and vegetation immediately on the top of this rise (R.61).

In the area bounded on the east by the sharp rise in elevation and on the west by the north-south center line of Range 22 East of SBM., California, during the period between 1874 (the date when the Palo Verde valley was first surveyed) and 1935 (the date the gates of Hoover Dam were closed), the Colorado River channel shifted many times by natural movements of the river and shifted at least once in the immediate vicinity of the subject lands by man-made rechannelization of the river (R.61).

In 1964 the Bureau of Reclamation entered upon the subject land to construct roads for the purpose of reaching authorized revetment and protective construction work on the Colorado River. In the course of this construction, the contractor cut fences and filled cattle guards located upon the land occupied by the defendants (R.61-62). This action was then instituted on March 27, 1964 (R.1-8).

Pursuant to stipulation, a temporary restraining order was entered on March 27, 1964, and a preliminary injunction was issued on April 10, 1964 (R. 18-19) enjoining the defendants from interfering with the use of the land by the plaintiff or its contractor in the construction work. On April 28, 1964, the State of Arizona filed a Motion to Intervene as a defendant (R.35-38) and in its proposed Intervenor's Answer alleged that the State of Arizona was the owner of the lands involved and prayed that title be adjudged in the State of Arizona (R.39-42). The State of Arizona was permitted to intervene in this action on March 1, 1965.

On April 8, 1966, the United States filed a Motion for Partial Summary Judgment based principally upon the contention that there was no genuine issue as to any material fact (R.88-91). After a hearing, Judge Craig denied plaintiff's Motion for Partial Summary Judgment.

Although, there were peripheral issues involving damages and estoppel presented to the lower court, the dispositive issues involved a determination of the location of the ordinary high water mark and the extent of the bed of the Colorado River. In a Joint Pre-Trial

Memorandum (R. 60-71) the parties to this action agreed, that:

- “1. For the purposes of this action and for this reach of the river only, the Colorado River is navigable.
2. When Arizona was admitted to statehood it acquired title to the lands underlying the navigable waters of the Colorado River between the east ordinary high water mark and the thread of the stream on the west. It is agreed that pursuant to the Submerged Lands Act, 43 U.S.C., 1301, et seq. 67 Stat. 29, Congress confirmed title to these lands to the State.”

In the Joint Pre-Trial Memorandum (R.66-71) and in a Pre-Trial Order (R. 77-79) issued subsequently by the court, the issues of law were set forth. The main issues were:

- “1. Where is the ordinary high water mark of a navigable river?
2. Whether the ordinary high water mark of a navigable river is altered where the flow of that river has been controlled by man-made structures.
3. Whether the common law doctrine of riparian rights, including accretion and reliction as it relates to change of ownership of real property, applies in Arizona.
4. If the answers to issues of law numbers 2 and 3 are in the affirmative, and assuming that structures on the river constructed by the United States resulted in the alteration of the flow of the river, to the extent that land within the high water mark of the river prior to the construction of said structures is exposed, except in times

of flood, can the plaintiff, United States of America, assert title to said land?

5. What is the effect, if any of the 1903 and 1920 withdrawal orders issued pursuant to authority given under the Act of June 17, 1902, 32 Stat. 338?"

In the Joint Pre-Trial Memorandum, issues of facts relating to the question of title to the subject lands were set forth. These issues were:

- "1. Where was the ordinary high water mark of the Colorado River on February 14, 1912 and in succeeding years?
2. If the waters of the present Colorado River do not reach the ordinary high water mark as it existed prior to control of the flow of the River in 1935, what are the causes of this change?
3. Are the lands involved in this litigation located between the center line of the Colorado River on the west and the ordinary high water mark of the River on the east?
4. Did the withdrawal orders of 1903 and 1929 relate to the lands involved in this litigation or to any lands lying between the ordinary high water mark on the east ordinary [sic] center line of the Colorado River on the west?"

At the trial appellee presented testimony seeking to show that the lands involved are now, and were always, a part of the public domain lying east of the ordinary high water mark and outside the bed of the Colorado River or in the alternative are lands which have been accreted or relicted to public domain lands lying to the east of the subject lands. The appellee's witnesses

took the position that the bed of the navigable Colorado River has always occupied a limited area similar to the area occupied by the present flow channel of the river. Through its witness John S. McEwan, the appellee presented a series of exhibits (T. 5-79 and Exhibit 7) showing how the location of this limited channel changed between the years 1879 and today.

On the other hand, the appellants asserted that the subject lands were a part of the bed of the river when Arizona was admitted to the Union on February 14, 1912, and that Arizona became the owner of the subject lands on that date. The appellants presented eye-witnesses who testified that prior to control of the river in 1935, the subject land supported the flow of the river during part of almost every year (T. 274, 279, 297, 305-307, 324, 325 and 331). The appellants presented several expert engineering witnesses who testified that their studies and observations made on the land showed the subject land had supported the flow of the river during a part of most years prior to 1935 (T. 393, 503 and 551). These studies are part of the record (Exhibits KK-1, KK-2, RR and QQ). The engineering studies and the testimony of the appellants witnesses relating to the flow of the river upon the subject land was supported by the testimony of appellees witnesses (T. 114-116, 124, 159-166, 251-258). All of the witnesses for both appellants and appellees agreed that the river flowed over the subject land during a part of most years previous to 1935.

The appellants contended that the lands are today free from inundation by the flow of the river primarily as a result of the abrupt changes caused by the con-

struction of Hoover Dam by the appellees and the subsequent closure of the gates of that dam in 1935, and that the present ordinary high water mark of the river exists by virtue of the controlled flow resulting from construction of Hoover Dam and other dams upstream from the lands in question. The District Court sustained this contention (R. 118). This dam was constructed for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River¹ and it has been completely effective in terminating the normal annual high flows of the river.

In the court below, the appellee argued that federal, not state law, determines the extent and nature of the United States title to accretion and reliction to federally-owned uplands. The appellants argued that as a fact accretion and reliction had not occurred in relation to the subject lands and that even if accretion and reliction had occurred, the state law rejected the doctrine of accretion and reliction. Since conclusion of this matter in the trial court, the Court of Appeals of Arizona, Division One, in the case of *State of Arizona v. Gunther & Shirley Company*, 5 Ariz. App. 77, 423 P. 2d 352 has held that the doctrine of accretion applies in Arizona notwithstanding the constitutional provision that the common law doctrine of riparian water rights shall not obtain or be of any force or effect in the state.

On November 4, 1966, Judge Craig entered his Findings of Fact, Conclusions of Law and Judgment, hold-

¹ Boulder Canyon Project Act, 67 U. S. Stat. 29, 43 U.S.C. 617

ing that title to the lands in question is in the United States of America, free and clear of any right, title, interest, claim or demand of defendants or intervenors (R. 107-116).

This appeal followed (R. 130).

SPECIFICATIONS OF ERRORS RELIED ON

1. The District Court erred in holding that the ordinary high water mark of a river is established by the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain.

2. The District Court erred in finding that it is immaterial to determine the location of the ordinary high water mark of the (Colorado) River in 1912 or subsequent dates.

3. The Court erred in holding that the ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the land in question and that the activities of the United States in constructing certain works within the river to confine and improve the channel had no effect upon location of the ordinary high water mark.

4. The District Court erred in holding that the lands in question were established by accretion or reliction and were accreted to or relicted to land owned by the United States.

5. The District Court erred in finding that no part of the lands in question lie within the bed of the Colo-

rado River from the thread of the river to its easterly bank, or otherwise.

6. The District Court erred in finding that the lands in question were withdrawn from entry by the withdrawal orders of January 13, 1903, and February 9, 1929, issued pursuant to Act of Congress dated June 17, 1902, 32 Stat. 388.

7. The District Court erred in holding that the title of the subject land is presently in the United States and that the defendants and intervenors have no right, title, interest, claim or demand to the lands in question.

8. The District Court erred in denying Defendants' motion to strike all testimony concerning the configuration of the river after 1935, the date of the closing of Hoover Dam (T. 170, Line 13, through 171, Line 6).

9. The District Court erred in denying Defendants' motion to strike testimony relative to the position of the channel of the river and all other facts concerning the movement of the channel of the river after 1935 (T. 229, Line 22, through 230, Line 6).

QUESTIONS PRESENTED

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether the ordinary high water mark of the river as it existed in 1912 or at subsequent dates is material in determining title to the subject lands.

3. Whether changes in the flow pattern of the Colorado River caused by action of the United States by construction of Hoover Dam changed or altered the then existing ordinary high water mark for purposes of changing ownership to the lands affected.

4. Whether the man-made changes in the flow pattern of the Colorado River caused by construction of Hoover Dam resulted in accretion, reliction or avulsion in the area of subject lands.

5. Whether the man-made changes of the flow pattern of the Colorado River in the area of subject lands resulted from the construction of Hoover Dam were within and a part of the specific purposes of the Boulder Canyon Act, to wit, "... controlling the floods, improving navigation and regulating the flow of the Colorado River ..."

6. Whether the United States, after installing structures designed to control the floods and regulate the flow of the Colorado River, is estopped to claim that it now takes title to all of the lands resulting from that control and regulation.

7. Whether withdrawal orders of 1903 and 1929 issued pursuant to authority given under the Act of June 17, 1902, 32 Stat. 338, have any effect upon land within the bed of the navigable Colorado River owned by the State of Arizona.

SUMMARY OF ARGUMENT

The court below found that title to the land in question is in the appellee, the United States, free and clear of any right, title, interest, claim or demand of defend-

ants or intervenors. The reasoning of the court below is synthesized in its Finding of Fact that "it is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which defendants claim title or right to possession," and its Conclusion of Law that "the ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river. . . ." (R. 113-114).

In each of these findings, the court was in error.

The Colorado River is a navigable stream in the reach of the river involved in this action.² It is a well established principle of law, that upon admission into the union, a state acquires title to the beds of navigable rivers between the ordinary high water mark, or where a river forms a boundary between two states, between the ordinary high water mark on the side of the state and the center of the river.³ Congress by the Submerged Lands Act of 1953⁴ confirmed and recognized the respective states' title to lands beneath navigable waters lying within a state. Unquestionably at statehood Arizona became the owner of the bed of the navigable stream insofar as that bed lay within the boundary of the State.

² *Arizona v. California*, 283 U.S. 243, 51 S. Ct. 522.

³ *Pollard v. Hagan*, 44 U. S. (3 How.) 212; *Shively v. Bowlby*, 152 U. S. 1, 43, 14 S. Ct. 548; *Martin, et al v. Waddell*, 41 U. S. (16 Pet.) 410; *Hardin v. Jordan*, 140 U. S. 371 (11 S. Ct. 808); *Tyson v. State of Iowa*, 283 F. 2d 802 (C.A. 8).

⁴ Submerged Lands Act, *supra*.

Establishment of the location of the ordinary high water mark of a navigable river and the area encompassed by the bed of that river has been the subject of numerous cases including several cases decided by the United States Supreme Court.⁵ Although the language of these cases does not establish an exact rule for every fact situation, these cases generally hold that *the ordinary high water mark of a navigable river is established at the line created by the water during the normal annual high flow stage of the river's annual cycle*. The evidence presented below, including eyewitnesses to the flow, the vegetation pattern, the soil condition, exhibits and the testimony of expert witnesses established the location of that line. The subject land was within the ordinary high water mark when Arizona entered the Union and Arizona took title to the subject land at that time. In order for the appellee to prevail, it must establish some legal basis upon which title was returned to it after 1912.

The parties to this action admitted in their Joint Pre-Trial Memorandum that changes in the flow of the river in the area of the subject land were caused by construction of Hoover Dam and the resulting control of the flow of the river (R. 65). Congress authorized the construction of works on the Colorado River for the specific purpose of *controlling floods, improving navigation and regulating the flow of the Colorado River*.⁶ This control of the river has greatly altered the natural ordinary high water mark of the river. The flow was altered abruptly and finally when the gates

⁵ *Howard v. Ingersoll*, 54 U.S. (13 How.) 380; *Alabama v. Georgia*, 64 U.S. (23 How.) 505; *Oklahoma v. Texas*, 260 U. S. 606.

⁶ Boulder Canyon Project, Oct. *supra*.

of Hoover Dam were closed. The resulting changes were sudden and obvious (not gradual and imperceptible) and therefore not accretive or relictive.⁷

The general law provides that lands formed by artificial reliction or accretion can be claimed by a riparian owner⁸ unless the artificial conditions causing the accretion or reliction were created by the claimant for that specific purpose.⁹ The United States did not gain title to the subject land by reliction or accretion resulting from acts of its agents which terminated the flow of the river over these lands and caused the lands to appear as relicted or accreted to the uplands owned by the United States.

ARGUMENT

I

INTRODUCTION

The decision of the court below that the lands in question belong to the United States rests on three fallacies. To say that location of the ordinary high water mark of the river at statehood, the date Arizona took title to the bed of a navigable stream, is immaterial, is to disregard in toto the rights granted to the state

⁷ *Philadelphia Co., v. Stimson*, 223 U. S. 605, 624 (32 S. Ct. 340, 346)

⁸ *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 50-66 and *Beaver v. United States*, 350 F. 2d 4 (C.A. 9).

⁹ *Thompson on Real Property*, Sec. 2560, Vol. 5A, p. 604; 56 *Am. Jur.*, Waters Sec. 486, pp. 899-900; 65 *C.J.S.*, Navigable Waters, Sec. 82(2), p. 257; 134 *A.L.R.*, 467, 472 and 91 *A.L.R.* 2d 857. This court in *Beaver v. U.S.*, *supra*, limited this rule by stating that a riparian owner could claim lands formed by accretion or reliction "unless, perhaps, structures are erected for the specific purpose of causing the accretion."

under the “equal footing doctrine.”¹⁰ To say that the ordinary high water mark of a river is established by the present flow channel of that river when that flow channel was artificially created is once again to deprive the State of Arizona of its rights under the “equal footing doctrine.” Finally to ignore the activities of the United States in altering the flow of the river to deprive Arizona of its title to land within the river bed is to condone tactics which justice should not allow. These fallacies are not consistent with the law.

II

THE LOCATION OF THE ORDINARY HIGHER WATER MARK AND BED OF THE COLORADO RIVER IN 1912 IS MATERIAL BECAUSE IT DETERMINES THE AREA OF LAND WHICH ARIZONA TOOK TITLE TO WHEN IT ENTERED THE UNION.

The court below found as a fact, that “it is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which the defendants claim title or right to possession.” In 1912 when Arizona was admitted to the Union, it took title to the beds of navigable streams lying within the boundaries of the State. Any discussion of the state’s rights to any of these lands today must of necessity begin with the area encompassed within the state’s boundaries in 1912. We submit that this finding of the court needs no legal citation to illustrate its incorrectness. In order to determine present ownership of the subject lands, the

¹⁰ 37 U.S. Stat. 39, 1728; *Shiveley v. Bowlby*, *supra*.

court must look first to the conditions as they existed in 1912 and then to changes and the causes of any changes of title which have occurred since that date.

III

THE BED OF THE COLORADO RIVER IN ITS NATURAL STATE INCLUDED ALL OF THE AREA BELOW THE ORDINARY HIGH WATER MARK WHICH IS THE LINE CREATED BY THE WATER DURING THE ANNUAL HIGH FLOW STAGE OF THE RIVER'S ANNUAL CYCLE.

The parties to this appeal are in agreement, that the State of Arizona owns the bed of the river and that this bed is the area located below the ordinary high water mark of the river. Any doubt about the state's right to lands within the bed of the river was settled when the United States, pursuant to the Submerged Lands Act¹¹ quit claimed to the state all lands underlying navigable waters up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction.

The paramount issue in this case, is therefore the location of the ordinary high water mark. At first glance, it might appear that this issue could be settled simply by observing the facts of where the river now flows. In a normal action, this might be so. However, in the instant case, we are dealing with a river which has been completely controlled since 1935 (T. 24-25, 363) and the natural flow and marks created by the natural flow are not today as readily observable as would be desired. However, Exhibits 4, 22-A, 22-B,

¹¹ Submerged Lands Act, *supra*.

22-C, being 1930 aerial photographs of the subject property give the court an actual view of the condition of the subject land just four years prior to the complete control of the river.

The evidence presented in the court below established that in most years prior to 1935, the river flowed over and upon all of the subject land for a period of from a few days to several weeks during most years. (R. 88, 112, 156-159, 251-258, 274, 279, 305-307, 324-325, 331). The natural river had two distinct stages, i.e., the volume of flow in the river was normally at a low stage between late July and April, and at a much higher stage from early May to mid-July following a definite and predictable pattern (T. 368-370). This ordinary flow established the ordinary high water mark of the river.

In *Howard v. Ingersoll*, supra, the United States Supreme Court, faced with a problem of defining the bed of the Chattahooche River, for purposes of establishing the boundary line between the State of Georgia and federal territory, established a definition of the bed of the river. This definition has since been followed in substantially all cases which have attempted to define the ordinary high water mark and the bed of a navigable river.

The court stated:

“ . . . When banks of rivers were spoken of those boundaries were meant to contain their waters at the *highest flow*, and in that condition they make what is called the *bed of the river* . . . (Emphasis added.) p. 415.

“The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width . . . The bank or slope from the bluff or perpendicular of the bank *may not be reached by the water for two-thirds of the year, still the water line impressed on the slope is the line required by the commissioner, and the shore of the river though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line . . .* Both bank and bed are to be ascertained by inspection *and the line is where the action of the water has permanently marked itself upon the soil. . . .*” (Emphasis added.) p. 417

A few years after the decision in *Howard*, a similar question came before the Supreme Court. In *Alabama v. Georgia*, *supra*, the court reiterated the basic concept as to the location of the bed of a river and stated:

“ . . . [T]he bed of the river is that portion of soil *which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extra ordinary freshets of winter or spring, or the extreme drought of the summer or autumn. . . .*” p. 515.

The evidence presented in the court below established that the flow of the river in its natural condition is subject to extreme variations. An expert witness for the appellant testified that the normal high flows — as distinguished from the unpredictable freshets or floods — (T. 243, 244, 497) of the river are 100-200 times greater than the normal low flows (T. 414). Because of this great variation, the flow of the river in its nat-

ural condition alternately covered and left bare large areas of land within the bed of the river. The land left bare during the low flow period is no less a part of the bed of the river than the area permanently covered by the flow.¹²

Approximately 30 years have passed since the flow of the river in the area of the subject land was controlled. This control has resulted in many of the physical features, which would aid in establishing with exactness the ordinary high water mark of the river, becoming more difficult to observe. In the absence of a clear natural line impressed on the bank, some courts have turned to a discussion of the character of vegetation and whether the land was usable for agricultural purposes as an aid to determine the location of the line describing the bed and the ordinary high water mark of a river. There is however, conflict on the issue of vegetation within the bed of a navigable stream.¹³ The better rule concerning vegetation as a guide to determine the extent of the bed of a river established in *Howard* has been followed by many decisions.¹⁴

¹² *Churchill v. Kingsbury*, 174 P. 329, 178 Cal. 554.

¹³ *United States v. Chicago B. & O. Ry. Co.*, 90 Fed 2d, 161, 170 where the court took the extreme view that the bed is the area where all vegetation has been destroyed and *Howard vs. Ingersol*, supra, where the Supreme Court took the view that the character of the vegetation, rather than the absence of vegetation determined the area within the bed of a river.

¹⁴ *State of Iowa v. Thomas*, 155 N.W. 859, 173 Iowa 408; *Johnson v. City of Charleston*, 112 S.E. 577, 91 W.Va. 318; *Driesbach v. Lynch*, 243 P. 2d 446; *Raide v. Dollar*, 203 P. 469, 34 Idaho 682; *City of Tulsa v. Peacock*, 74 P. 2d 359, 181 Okl. 383; *State ex rel. v. Sorenson et al.*, 222 Iowa 1248, 271 N.W. 234; *State v. Longfellow*, 169 Mo. 109, 69 S.W. 374; *State ex rel Thompson v. Parker*, 132 Ark. 316, 200 S. W. 1014; *Anderson v. Reames*, 204 Ark. 216, 161 S.W. 2d 957; *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, Ann. Cas. 1915 C, 1148; *Union Sand & Gravel Co. v. Northcott*, 102 W. Va. 519, 135 S.E. 589; *Tilden v. Smith*, 94 Fla. 502, 113 So. 708; *Carpenter v. Board of Commissioners*, 56 Minn. 513, 58 N.W. 295, 45 Am. St. Rep. 494; *Sun Dial Ranch Co. v. May Land Co.*, 61 Or. 205, 119 P. 758, 759; *Austin v. City of Bellingham*, 69 Wash. 677, 126 P. 59; *Willis v. United States*, 50 F., Supp. 99.

The purpose of using the character of vegetation is to help provide an easier means of locating the ordinary high water mark where there are not other adequate marks on the surface of the ground, and this purpose is served so long as there is a sufficient change in the character of the vegetation to permit determining the location of the bed of a river. We submit that the rule adopted in *Howard* and the cases following *Howard*, emphasizes the *change in vegetation or in the character of vegetation, rather than demanding a complete absence of vegetation within the bed, of a river is the proper reasoning*. Such reasoning is particularly true in an area like the southwest where vegetation springs up rapidly when adequate water is present in the soil.

Some courts have ruled that the gist of the ordinary high water mark is whether or not the river flowed over the land in a manner which prevented its use for agricultural purposes. Evidence presented in the court below clearly established that the subject land could not be and was not used for agricultural purposes until after the river was controlled in 1935 (T. 278, 304 & Exhibits 4, 22-A, 22-B and 22-C).

The Supreme Court in *Howard*, and other courts in many cases, make it very clear that the vegetation test for a navigable stream's ordinary high water mark means not that within such line vegetation has been destroyed by the water covering the soil but that the soil is or has been covered by water for a sufficient time to destroy its value for agricultural purposes.¹⁵ Witnesses

¹⁵ Ibid

in the trial below testified that the subject land was not usable for agricultural purposes until after the river was controlled in 1935 (T. 298, T. 304).¹⁶

In the recent case of *Borough of Ford v. United States*, 345 F. 2d 645 (C.A. 3, 1965), the third circuit, following the *Howard* and other well considered opinions stated:

“... [W]e are satisfied that the sound law as to what constitutes the river bed of a navigable stream is . . . the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed. The value for agricultural purposes is destroyed where terrestrial plants not all plant life ceases to grow. . . .”

We think that in view of the climatic conditions in the area of the subject land favoring rapid plant growth and the characteristics of the Colorado River to fluctuate greatly from season to season, this court must conclude that the subject lands are part of the bed of the river.

In establishing its meander line for the Arizona Statehood Survey of 1917, the Bureau of Land Management survey team determined the location of the ordinary high water mark in the area of subject land (Exhibit 7, Page 5). This ordinary high water mark established by observations made on the land by agents of the plaintiff (T. 110, 182, 194, 221-223) follows close along the foot of the bluff just to the east of sub-

¹⁶ Although livestock did graze on the subject land (T. 322) during the low flow period of the years there is absolutely no evidence that the land was ever used for agricultural purposes as that term is normally used.

ject land. This line along the foot of the bluff substantially agrees with the testimony of the witnesses who indicated that during normal high flow periods the water flowed across the subject land and against the bluff (T. 251-252, 297, 306). These exhibits and the testimony indicates that substantially all of subject land was below the ordinary high water mark except a small part in the northeast corner. There is no evidence to indicate a change in the ordinary high water mark established by this 1917 survey until Hoover Dam effectively controlled the Colorado River and altered the annual flow pattern of the river.

Expert witnesses for the appellee made extensive studies to locate the ordinary high water mark of the river. The results of these studies were presented to the court below through testimony and through Exhibits KK-1, KK-2 and QQ. In preparation of these exhibits, these experts spent considerable time on the subject lands and made observations relating to character of the soil and the vegetative differences on the subject land and the land immediately to the east (T. 405, 496, 507, 520) which confirmed the engineering studies as to the location of the ordinary high water mark and the bed of the river.

We submit that all of the evidence presented to the court below when measured by the cases heretofore cited, establishes that the subject land is land which was naturally within the bed of the river prior to 1935. The evidence shows: (1) That the flow of the Colorado River in times past was against the face of the bluff to the east of the subject land. (2) That the vegetative differences in the area of the subject land

and the land on the bluff to the east varies greatly and that the vegetation on the subject lands is of a type that grows and flourishes best where an abundance of water is always present. (3) That eye-witnesses observed the flow of the river over the subject lands for a considerable period of time during most years prior to 1935. (4) That surveys performed by agents of the United States established the ordinary high water mark in 1917 at a point to the east of the subject lands, even though at that time the main channel of the river according to appellees witnesses was not to the east of the subject land. (5) That the result of engineering work done by expert witnesses affirms all of the physical observations relating to the location of the ordinary high water mark observable in the past or today upon the subject land. (Exhibits L, M, N, O & P).

It is therefore submitted that the ordinary high water mark on the east bank of the river in the area of the subject land was the bluff line prior to 1935 and that this line has changed since that date only as a result of artificial control imposed by the appellee and its agents. The main flow channel has shifted within the bed of the river but the bed and the ordinary high water mark have remained substantially stationary and there was no movement of the bed of the river to which the rules of accretion and reliction can apply to divest the State of Arizona of title to the subject land.

We submit that the appellee bears the burden to establish that the subject land were and are outside the bed of the river. The only attempt by the appellees to establish an ordinary high water mark was that line shown at Page 5 of Exhibit 7, being the meander line

established by the Bureau of Reclamation in its 1917 survey on the subject land. This line established the ordinary high water mark to the east of the subject land.

Two other specifications of error required but limited mention in this section of the brief—the admission by the court below of evidence relating to movements of the river subsequent to 1935, and the effect of the 1903 and 1929 withdrawal orders.

We think these questions are answered by appellants discussion of the law concerning the location of the bed and the ordinary high water mark of the river. If appellants legal position is correct, by express language in the withdrawal orders (Exhibit 31 & 32), the subject lands were not affected by the withdrawal orders and testimony relating to movements of the river after 1935 is irrelevant, since these movements did not alter the location of the bed of the river and had no legal effect on the title of the State of Arizona to the subject lands.

IV

THE CLAIM OF THE APPELLEE THAT IT HAS GAINED TITLE TO THE SUBJECT LAND BY ACCRETION OR RELICTION IS NOT VALID.

Appellee contends that title to the subject land, if it was ever owned by Arizona, has been returned to the United States by the process of accretion or reliction. To support this claim, extensive evidence was offered at the trial concerning the movements of the *main flow channel* between 1874 and the present, (Exhibit 7 and

T. 28-39). There was testimony below that much of the movement, even of this main flow channel, was in fact, sudden and dramatic and was therefor avulsive, rather than accretive (T. 30-31, 34, 35, 48, 54).

A — CHANGES BETWEEN 1912 AND 1935 DID NOT ALTER THE BED OR ORDINARY HIGH WATER MARK OF THE RIVER.

Appellees basic contention regarding the river movements are invalid because the terms accretion and eliction refer to changes which occur only on the banks of bodies of waters, changing the location of the ordinary high water mark. In this case, the movements of the main channel throughout the period from 1912 to 1935 described by plaintiff's testimony in connection with Exhibit 7 have been entirely within the bed of the river. Testimony established that the bed of the river throughout these years remained constant, bounded by the bluffs on the Arizona side and the high ground of the levee on the California side (T. 252, 297, 306 and 455). The main flow channel moved from time to time, but the ordinary high mark remained substantially the same until 1935, when Hoover Dam brought about its sudden and dramatic impact. Since the ordinary high water mark remained unchanged until 1935, no accretion or reliction occurred before that date.

B — CHANGES AFTER 1935 WERE NOT ACCRETIVE OR RELICTIVE.

It is obvious that nothing could be more sudden than the closing of the gates of Hoover Dam in 1935, and the resulting change in the character of the river from a

basically uncontrolled river to a "conveyance channel" as it now is (T. 363).

Accretion is an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous and reliction is a term applied to land which is created by the gradual and permanent withdrawal of the water by which it was covered.¹⁷ Where the boundary of a tract of land is gradually and imperceptibly changed by accretion and reliction, this riparian owner gains title to the new lands formed. However, no change of title results when the location of a river changes abruptly, rather than gradually and imperceptibly.¹⁸

C — A RIPARIAN OWNER CREATING CHANGES IN THE BED OF A RIVER CANNOT CLAIM LANDS FORMED AS A RESULT OF THE CHANGES.

In the recent case of *Beaver v. United States*, supra, this court considered the question of whether the United States could claim a tract of land purportedly formed by accretion, where it had induced the accretion process. Although, the court in *Beaver* found that the actions of the United States were an insignificant factor in inducing accretions, the court citing *County of St. Clair v. Lovington*, supra, stated the general rule that the erecting of artificial structures does not alter the application of the accretion doctrine, "unless, perhaps, structures are erected for the specific purpose

¹⁷ 65 C.J.S., Navigable Waters, Sec. 81; 56 Am. Jur., Waters, Sec. 476.

¹⁸ 56 Am. Jur., Waters, Sec. 477; 65 C.J.S., Navigable Waters, Sec. 82 (1); *Philadelphia Co., v. Stimson*, supra.

of causing the accretion.” By this statement the court apparently recognized the general rule that the rights of accretion and reliction do not extend to an upland owner where he has caused the accretion or reliction by artificial means.¹⁹

The Boulder Canyon Act, *supra* was enacted by Congress for the purpose of “controlling floods, improving navigation and regulating the flow of the Colorado River.” Pursuant to this act, Hoover Dam was constructed upstream from the area involved in this litigation, and the gates of Hoover Dam were closed in 1935. After closure of the gates of Hoover Dam, the river became a completely controlled river. It is today a “conveyance channel” responding to direct demands for irrigation and power (T. 363). The river has been subjected to channelization work by the appellee, the purpose of which, is to *compress the river into a definite channel of a reduced width* (T. 24-25). Although, not set forth in so many words, the purpose of the Act was to prevent the annual high flow of the river which had prior to the construction of the dam, flowed upon large areas of land during its normal annual high flow cycle (T. 363-365 and Exhibit FF).

It is elementary that a party is presumed to know the natural consequences of his deliberate acts and is charged with such knowledge. What result could be more foreseeable, from the standpoint of the appellee and its agents, than that large areas of land formerly within the bed of the river would be removed from the

¹⁹ 65 C.J.S., *Navigable Waters*, Sec. 82 (2); 56 Am. Jur., *Waters*, Sec. 486. See also the cases discussed in 134 A.L.R. 467, 472; 91 A.L.R. 2d 857, 881; *Thompson on Real Property*, Vol. 5A, Sec. 2560; 37 Notre Dame Law 437.

bed and "protected" from the annual high flows formerly existing on the river (Exhibit FF). The controlled plan consisting of the construction of Hoover Dam and the subsequent rechannelization has been highly successful, and the high flow cycle of the river no longer occurs. The projected result has become the controlling fact. We submit that the United States is estopped from claiming title to the land it has "protected" by these projects. To hold otherwise would be a travesty on equity and an injustice.

One last case on this subject bears mentioning. In *Sea Coast Real Estate, v. American Timber Co.*, 113 A. 49, 92 N.J. Eq. 219, the New Jersey court indicated that accretion must in fact be by natural forces or by lawful acts resulting in an imperceptible change. The court concluded that if this were not the case, "*otherwise there would be no limit (in creation of accretion lands) but the length of the riparian owner's purse.*" This is particularly true in the case of the appellee as against the State of Arizona or private parties. If the appellee can create structures which cause reliction or accretion and gain title to the lands formed thereby, it, with its vast resources, can divest title to vast areas of land along navigable rivers.

We submit that accretion or reliction has not occurred with reference to the subject land, and that title to the lands remains in the State of Arizona.

CONCLUSION

For the reasons stated it is respectfully submitted that the district court's order adjudging and decreeing title to the land in question to be in the United States be reversed and the cause remanded with instructions to enter an order decreeing title to the land in question is in the State of Arizona.

Respectfully submitted,

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MAY, 1968

APPENDIX

TABLE OF EXHIBITS

EXHIBIT	IN EVIDENCE TRANSCRIPT OR RECORD PAGE
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2	1964 aerial mosaic R-103
3	1960 aerial mosaic R-103
4	1930 aerial mosaic R-103
5	Anaglyph - 1938 aerial photograph R-103
6	Anaglyph - 1939 aerial photograph R-103
7	Transparent overlays of river positions R-103
7-A	Pages 5 and 13 of Exhibit 7 T-200
8	1872 map, T. 7 N., R. 23 E., SBM R-103
9	Colorado River water surface profile 1902-03 R-103
10	River meander 1856 - 1912 - 1917 - 1922 F. N. Cronholm R-103
11	1915 Map - Palo Verde Levee District Boundaries R-103
12	1918 Map, T. 3 N., R. 22 W., SBM R-103
13	1924 Map - Palo Verde Valley R-104
14	Colorado River Map - 1932 R-104
15	Map - Colorado River Sections 1939 R-104
16	Palo Verde Levee Map 1942 R-104
17	Limited dependent resurvey and accretion survey -1962 R-104
17-a	Plat, same as Exhibit 17, showing subject land T-192
18	Field notes - 1962 dependent resurvey R-104
19	Colorado River water surface and bed profiles - 1942 R-104
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32	Certified Copy - historical index and 1929 Withdrawal Order	R-104
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36	1939 Aerial photograph of channel of Colorado River	T-470
37	Copy of extract from Water Supply Paper No. 918 - "Records at Base Station in Colorado River Basin, 1891 to 1938"	T-532
38	Letter of transmittal May 21, 1963, Lower Colorado Land Use Office to Mr. Edward Claridge	T-568
39	Office Memorandum May 27, 1963, Lower Colorado River Land Use Office	T-568
40	Letter of transmittal of rental fees to Lower Colorado River Land Use Office From Mr. Claridge	T-568

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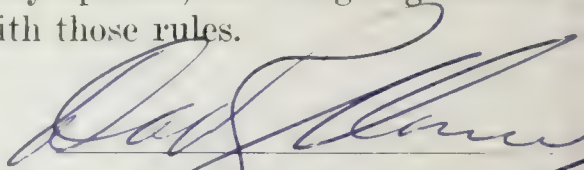
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



DALE R. SHUMWAY, Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD M. CLARIDGE and KAY T. CLARIDGE, his wife, et al.,

and

STATE OF ARIZONA, EX REL., OBED M. LASSEN,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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FILED

JUL 24 1958

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22312

EDWARD M. CLARIDGE and KAY T. CLARIDGE, his wife, et al.,

and

STATE OF ARIZONA, EX REL., OBED M. LASSEN,

Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of Judge Walter E. Craig (R. 107-118) is
reported at 279 F.Supp. 87.

JURISDICTION

The order of the district court of September 25, 1967,
contained the appropriate language certifying the partial decision

in favor of the United States for an interlocutory appeal (R. 117-118). Appellants filed timely application for appeal under 28 U.S.C. sec. 1292(b), which was granted on October 31, 1967 (R. 129). Jurisdiction of this Court rests on 28 U.S.C. sec. 1292(b).

ISSUES PRESENTED

1. Whether the entire area between the boundaries of the Palo Verde Valley through which flows the Colorado River in a shifting course is the bed of the Colorado River because for a few weeks of most years prior to 1935 the flood waters of the river overran the area.

2. Whether stabilization of the flow of the Colorado through the Palo Verde Valley by the Hoover Dam enlarged or diminished Arizona's title to land in the valley.

STATEMENT

The United States filed this suit to quiet title, to evict the Claridges, and for damages to the land resulting from the occupancy (R. 1). The Claridges asserted title to be in the State of Arizona and alleged justification of their occupancy under a lease from the State of Arizona executed subsequent to the filing of this suit. The State of Arizona intervened,

alleging title on the grounds that this land is located between the thread of the Colorado River and its easterly ordinary high water mark. At the trial before the district court sitting without a jury evidence was presented to show the various changes in the location of the main channel of the river from 1874 through 1935 and the types of vegetation found in the valley. At the close of the evidence and after oral argument the court found that the land was not within the bed of the Colorado River, that the United States had title to the land, that the defendants had no rights in the land, and retained jurisdiction to determine damages to the United States if any (R. 119-128). Subsequently the court entered a supplemental judgment containing the requisite findings to permit application for an interlocutory appeal.

The essential physical facts in this case are not seriously disputed. They are for the most part set forth fully in the district court's opinion and findings (R. 107-114) and may be summarized as follows:

The land in question is in the Arizona portion of the Palo Verde Valley east of the present channel of the Colorado

River, about one and one-half miles south of Ehrenburg. Except for a narrow arm, or corridor, which abuts the present east bank of the river channel, the land is about one-fourth of a mile east of the present bank of the river channel.

The valley is about 15 miles from north to south and at the point in question is about eight miles wide. The floor of the valley is alluvial soil deposited by the river as it meandered across the valley and eroded from the Arizona bluff on the east and the California bluff on the west. The area encompassed was acquired by the United States from Mexico in 1848 under the Treaty of Guadalupe Hidalgo, 9 Stat. 922.

The Colorado River at this point is a navigable stream and the State of Arizona holds title to the land under the river from the thread to the easterly ordinary high water mark. State of Arizona v. State of California, 283 U.S. 423 (1930).

The Colorado River has been, at peak flow, a turbulent river carrying large quantities of water and with it large quantities of silt and alluvion. Since 1874, when the first attempt was made to measure and establish the flow and exact location of the river, its meanderings have been generally on the

Arizona side. Its various locations with respect to this land at all times from 1874 to 1964 is generally agreed by the parties and is described at R. 110-113. A convenient demonstration of the meanderings as related to this land is shown by the overlay map placed in evidence by the Government in connection with Mr. McEwan's testimony (Gov't Ex. 7, T. 5-168, 523-535).

Pursuant to the Act of June 17, 1902, 32 Stat. 388, all public lands within six miles east of the ordinary high water mark of the Colorado River were withdrawn by Executive Orders of January 31, 1903, and February 19, 1929, including the instant land insofar as it is east of the ordinary high water mark. In 1935, the gates of the Hoover Dam upstream from this property were closed, 1/ and since then the river has been relatively stabilized to flow in its present position.

At the trial, appellees produced testimony as they suggest (Br. 17) that in most, but not all, years prior to 1935, water flowed over this land for a period of a few days to several weeks. They also produced witnesses who testified that no

1/ The Hoover Dam was constructed pursuant to the Boulder Canyon Project Act of 1928, 43 U.S.C. sec. 617.

much farming was accomplished between the bluffs prior to 1935, although one had experimented with barley and harvested the crop before the late spring or summer floods (T. 105). Appellees concede that the valley area was used for cattle grazing (Br. 21). Witnesses also testified and the Government conceded that the vegetation of the valley area was different from that east of the bluffs.

The Government's evidence was substantially that set forth by the court as to the meanders of the river over the period from 1877 to 1964 and to point out that even prior to 1935 there was considerable terrestrial type vegetation including trees in the area in question (T. 21, 142-145, 241-242, 245, 256-258).

The district court viewed the property, found the facts to be substantially as set forth above and determined that:

1. It is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which defendants claim title or right to possession.

2. The present ordinary high water mark of the river exists by virtue of the

Hoover Dam and other dams upstream from the lands in question.

3. The lands in question are located to the east of the present ordinary high water mark of the Colorado River.

* * * * *

6. No part of the lands in question lie within the bed of the Colorado River from the thread of the river to its easterly bank, or otherwise.

The court concluded:

1. The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow.

2. The ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river to confine and improve the channel, which work has been undertaken within the purview of the Boulder Canyon Project Act. 43 U.S.C. § 617 et seq.

3. The lands in question were established by accretion or reliction from the action of the Colorado River, or by both, and were accreted to or relictied to lands owned by the United States, withdrawn from entry by lawful

action of the United States in 1903 and 1929; the title thereto is presently in the United States.

Accordingly this partial judgment on the merits in favor of the United States was entered (R. 117-118). This appeal followed (R. 129).

ARGUMENT

I

THE BED OF A NAVIGABLE RIVER IS DETERMINED BY THE ORDINARY HIGH WATER MARK

Introduction. - The issue in this case is quite simple. The area in question was acquired from Mexico in 1848 under the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Appellants' claim is that the land is a part of the bed of the Colorado River, a navigable stream. Such title was confirmed by the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. sec. 1301(a)(1) which, in effect, quitclaimed to the state

* * * all lands * * * covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, * * * up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *. (Emphasis added.)

Clearly under this Act which merely confirmed the existing law in this respect, both the United States and the State of Arizona gain or lose title as the river shifts its course by accretion, erosion and reliction. Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965). Although appellants' brief contains some statements indicating disagreement with the district court's determination that the lands in question are the result of accretion or reliction of the Colorado River (Br. 24-26) no serious attack on this determination is mounted. For example no real effort is made to show a particular movement of the river was avulsive so as to fix title to this, or any, particular area at any particular date in the past. Consequently, we are left only to determine what is the bed of this navigable river, the Colorado, in this area.

Use of the term "high water mark" is really a short-hand way of summarizing, somewhat inexactly like all generalizations, the substantial body of law on this subject. For example one of the classic cases does not even use the term. The Supreme Court in Alabama v. Georgia, 64 How. 505, 515 (1859) stated:

* * * the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

Earlier the Supreme Court in rejecting ordinary low water as the boundary in Howard, et al. v. Ingersoll, 54 How. 380 (1851) stated:

When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to

its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. * * *

Again in Oklahoma v. Texas, 260 U.S. 606 (1923), the Supreme Court reiterated the foregoing and concluded at pp. 631-632:

Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the waterwashed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

Through practical application of these principles, primarily in state courts, the "high water mark" definition has

become controlling. See e.g., Provo City v. Jacobson, 111 Utah 39, 176 P.2d 130, 132 (1947); City of Peoria v. Central Nat'l Bank, 224 Ill. 43, 79 N.E. 296 (1906); Wilcox v. Penny, 250 Iowa 1378, 98 N.W.2d 720, 723 (1959); Raide v. Dollar, 34 Idaho 682, 203 Pac. 469, 471 (1921). One of the most frequently cited decisions is Welch v. Browning, 115 Iowa 690, 692-694, 87 N.W. 430, 431 (1901), where the court set forth an appropriate guideline for practical application:

The question as to what in law constitutes ordinary high-water mark is the leading question in this case. It therefore becomes necessary to define what the law regards as ordinary high-water mark. It does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, since the waters brought by these annual rises do not usually remain permanently, or for any great length of time, and crops may be raised on the soil as the water subsides. Nor yet does it mean meadowland adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing and pasturing purposes. (Emphasis added.)

The Court of Appeals for the Third Circuit has had the most recent occasion to deal with this very practical concept of defining a river bed. In Borough of Ford City v. United States, 345 F.2d 645 (1965), the Court stated at p. 648:

This principle is followed in a great number of well considered opinions some of which are cited below. We are satisfied that the sound law as to what constitutes the river bed of a navigational stream is as carefully outlined in the Harrison opinion i.e. the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed. The value for agricultural purposes is destroyed where terrestrial plants not all plant life ceases to grow. Just as definitely the same law is that the bed of such stream "* * * does not extend to or include that upon which grasses, shrubs and trees grow though covered by the great annual rises." Harrison v. Fite, supra 783.

The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line, as shown by erosion, and other easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation, and litter, it determines the line of ordinary high-water. Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914);

Willis v. United States, 50 F.Supp. 99 (W. Va. 1943). Also a test of the distinct line is the destruction of terrestrial vegetation so these are not really two separate tests but must, of necessity, complement each other.

As might well be expected in the search for a practical workable rule, the courts gradually shifted to an expression of principle defined in physical terms. Thus, we have now accepted the "vegetation line" in those situations where there is no other practical method of ascertaining the limits of the bed of the river. For example, United States v. Chicago B. & Q. R. Co., 90 F.2d 161, 170 (C.A. 7, 1937), defines the limits as follows:

The line of ordinary high water divides the upland from the riverbed. The riverbed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow. Harrison v. Fite (C.A. 8, 1906) 148 Fed. 781.

See also Harrison v. Fite, 148 Fed. 781 (C.A. 8, 1906); Willis v. United States, 50 F.Supp. 99, 100 (W. Va. 1943).

Application of these practical considerations, which are the embodiment of the law, to the facts of the instant case demonstrates the lack of merit in appellants' broad assertion that the entire Palo Verde Valley from the Arizona bluffs to the California bluffs (8 miles at the point in issue) is the bed of the Colorado River (Br. 22, 25). For, although appellants' brief pretends to be directed at various and more narrow questions, the substance of it is an assertion that the bed of the Colorado River in 1912, the date of Arizona's admission as a state, and at all times thereafter until 1935 when the Hoover Dam was closed, was all lands between the bluffs on the California side and the bluffs on the Arizona side of the Palo Verde Valley. The contention is that the entire valley is the riverbed.

In this case, we can virtually dismiss the "vegetation line" on the basis of the stipulated facts and the evidence at the trial. It was agreed that the vegetation in the valley differed from that beyond the bluffs. Of course it did. As the court has noted the historic and prehistoric facts, the valley is an alluvial plain which because of soil conditions and

water table level would have different vegetation from the area beyond the bluffs. Perhaps, the most important fact to be noted at this point is that the area appellants claim to be riverbed is and has been for many years prior to 1935 replete with vegetation, trees, grass and shrubs and has been used for farming and cattle grazing. Clearly there is no "vegetation line" outside the banks of the present bed that would aid appellants.

As the quotations from the Supreme Court, supra, show ascertainment of the banks of the Colorado is something subject to visual perception--no magic formula is required. It must be recalled that the district court heard the testimony, examined the exhibits, physically inspected the area and, as is plain from the conclusions, applied the appropriate criteria. Such a determination based as it is on ample support in the record is not clearly erroneous and as this court has stated "must be treated as unassailable." Wittmayer v. United States, 118 F.2d 808, 811 (1941); Rule 52(a) F.R.Civ.P.; International Boxing Club v. United States, 358 U.S. 242 (1959).

Under strikingly similar factual circumstances the Supreme Court in Oklahoma v. Texas, 260 U.S. 606 (1923), disposed of a bluff to bluff claim, as appellants made here, in clear terms at p. 635:

This survey of the physical situation demonstrates that the banks of the river are neither the ranges of bluffs which mark the exterior limits of the valley, nor the low shifting elevations within the sand bed. * * *

So here the banks of the Colorado are not now and have never been the bluffs marking the exterior limits of the valley.

II

THE CONSTRUCTION AND OPERATION OF THE HOOVER DAM IN 1935 AND THEREAFTER NEITHER REDUCED NOR ENLARGED ARIZONA'S TITLE TO LAND IN THE PALO VERDE VALLEY

As we have demonstrated in Point I, supra, the bluffs marking the exterior limits of the river valley are not and never were the banks of the Colorado River so as to include the entire valley in the bed of the stream. Referring again to the overlay and other relevant exhibits (Statement, supra, p. 5) it is clear that since 1874, the river has gradually shifted its course over a wide range in the area here involved. As the court

noted, this action has created upland by accretion and reliction (Statement, supra, pp. 6-8). Conversely, of course, the same action has created or caused different areas to become riverbed. Consequently, the district court was clearly correct, having rejected the bluff to bluff theory, in finding it unnecessary to determine exactly where the riverbed was in 1912. At any given point in time thereafter, the boundary between land owned by the United States and land owned by the State of Arizona changed as the bed of the river and its easterly bank changed through accretion and reliction. 2/ Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965); Arkansas v. Tennessee, 246 U.S. 158, 173-174 (1918); Nebraska v. Iowa, 143 U.S. 359, 360-361 (1892); Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912).

Application of similar logic and familiar legal principles demonstrates that operation of Hoover Dam beginning in 1935 has caused no accretion nor reliction nor any change in

2/ Although appellants apparently concede that Arizona recognizes accretion and reliction (Br. 8) we point out that federal law controls in this situation anyway. Hughes v. State of Washington, 389 U.S. 290 (1967); United States v. State of Washington, 294 F.2d 830 (C.A. 9, 1961), cert. den., 369 U.S. 817.

ownership. Since the entire valley was never the riverbed, the Dam did not change that aspect. All the Dam accomplished was a stabilization of the river flow. Thus, rather than reduce the area owned by Arizona as riverbed, the Dam has merely indirectly inhibited, to some extent, the owned area in its former gradual wanderings over the floor of the valley.

But even if (as does not appear) some accretion or reliction was caused in part by operation of the Dam, the result would be the same. As this Court stated in Beaver v. United States, 350 F.2d 4, 11 (1965).

The erecting of artificial structures does not alter the application of the accretion doctrine (County of St. Clair v. Lovington, 90 U.S. (23 Wall.) 46, 50-66, 23 L.Ed. 59 (1874)), unless, perhaps, structures are erected for the specific purpose of causing the accretion. * * *

No one would contend that the United States constructed the Hoover Dam for the purpose of enlarging its title in the instant area or any other area on the Colorado River by accretion. Hoover Dam was constructed for the purpose of improving navigation and to store water for supplying the growing needs of Arizona and California. In fact, Arizona benefits to the extent of 3,000,000 acre feet of water per year.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

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JULY 1968.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD L. SUGGS,
Petitioner-Appellant,

vs.

No. 22314

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FILED

DEC 27 1967

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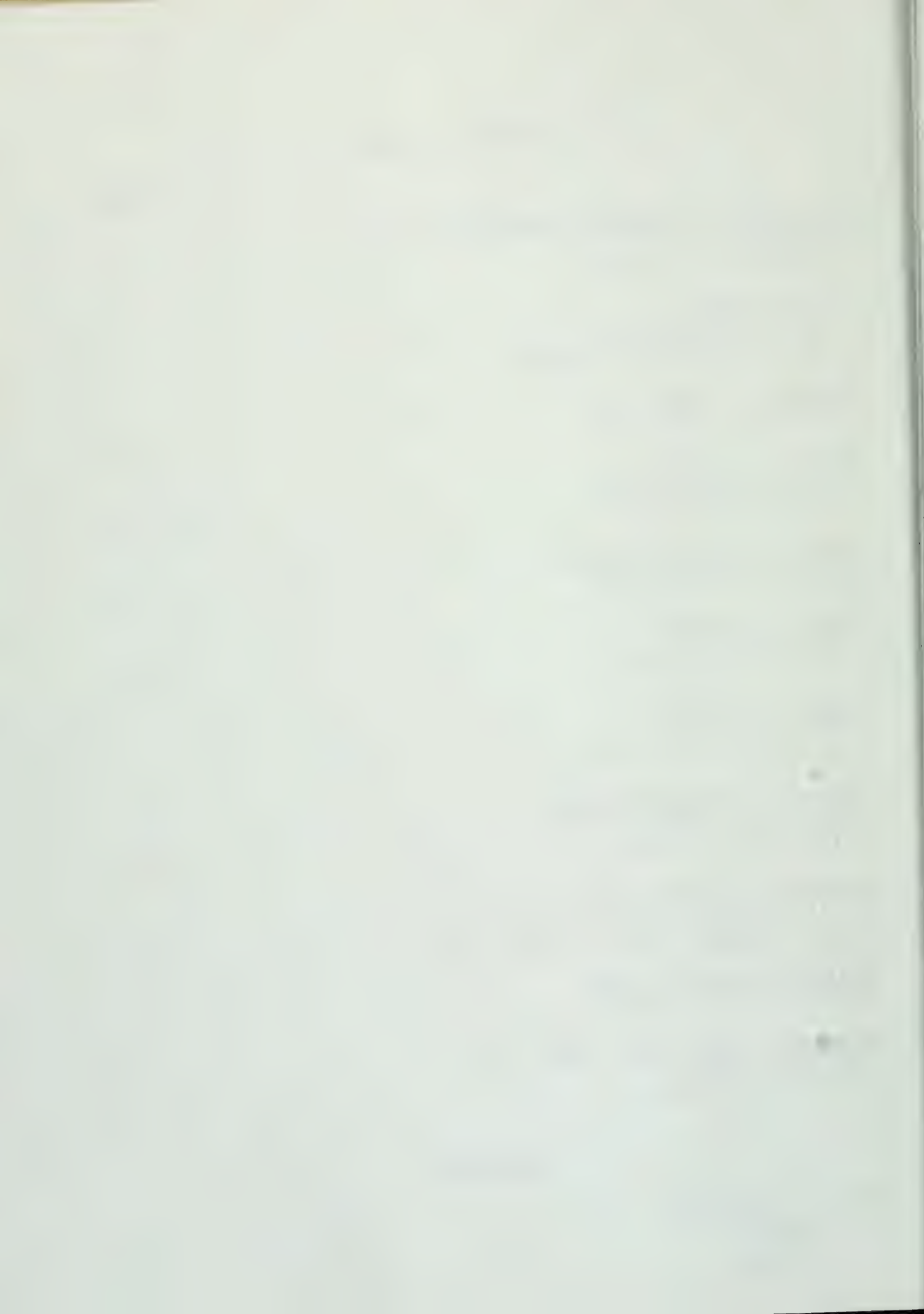


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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD L. SUGGS,)	
)	
Petitioner-Appellant,)	
)	
vs.)	No. 22314
)	
LAWRENCE E. WILSON, Warden,)	
San Quentin State Prison,)	
)	
Respondent-Appellee.)	
_____)	

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28 United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts:

Appellant, Edward L. Suggs, was convicted of burglary in the first degree upon his plea of guilty in the Superior Court of the State of California for the County of Los Angeles and on March 11, 1954, was sentenced to state prison for the term prescribed by law.

On January 7, 1954, a preliminary hearing was held in the Municipal Court for the Los Angeles Judicial District at which time appellant was held to answer in the superior

court on an information charging burglary and assault with intent to commit rape. See Exhibits C and E (July 5, 1967).^{1/} Appellant, represented in the superior court by the Public Defender, regularly entered a plea of guilty as charged in Count 1 of the information. See Exhibit B (March 7). The minute order of that day reflects that the superior court found the burglary to be second degree and set the matter for sentence.

On March 11, 1954, the superior court denied appellant's application for probation and pronounced judgment and sentenced appellant on his plea of guilty as charged in Count 1. Within half an hour the superior court noted that the minute order of January 22, 1954, through clerical inadvertence, did not properly reflect the order of the court. The minute order of January 22, 1954, was corrected nunc pro tunc to read "The Court finds the crime to be Burglary of the 'first degree' instead of the 'second degree'." See Exhibit B (March 7).

Petitioner excused his failure to appeal this conviction in his original petition to the district court on the grounds that he had not been advised of his right to appeal. See page 3 of Petition for Writ of Habeas Corpus.

Appellant's petition for writ of habeas corpus filed with the California Supreme Court was denied without opinion on April 5, 1966.

B. Proceedings in Federal Courts:

On December 5, 1966, appellant filed a petition for

1. All references are to the Exhibits attached to appellee's returns in the District Court, and are denominated by the date of the return to which they are attached, i.e. either March 7 or July 5.

writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, Case No. 46107. On that same date an order to show cause was issued. Appellee, respondent below, filed a return to the order to show cause on March 7, 1967. The District Court issued an interim order on May 12, directing appellee to produce additional records. Appellee complied with this interim order on July 5, 1967, by filing a return to the interim order and supplemental points and authorities in opposition to the petition for writ of habeas corpus.

No traverse was filed to appellee's returns, and on August 2, 1967, the District Court denied the writ for habeas corpus, discharged the order to show cause, and dismissed the proceedings, concluding that appellant had been properly sentenced by the California Superior Court.

On October 17, 1967, the United States District Court issued a certificate of probable cause to appeal and on the same day appellant filed his notice of appeal.

C. Statement of Facts:

On January 3, 1954, appellant entered the Logan home about 3 o'clock in the morning and assaulted Mrs. Logan with intent to rape her. See Exhibit C (July 5). The preliminary hearing, a reporter's transcript of which is Exhibit C (July 5), was held on January 7, 1954, and appellant was held to answer in the superior court on an information charging him in count 1 with burglary and in count 2 with assault with intent to commit rape.

On January 22, 1954, petitioner appeared before the

superior court and entered a plea of guilty to Count 1 [burglary, California Pen. Code § 459]. Throughout all proceedings in the state courts appellant was represented by the public defender. See Exhibit B (July 5) and Exhibit B (March 7).

The minute order for January 22, 1954, reflects that upon petitioner's entry of plea the court found the burglary to be of the second degree. See Exhibit B (March 7).

On March 11, 1954, petitioner appeared before the superior court and sentence was pronounced as follows:

"Defendant is sentenced to the State Prison for the term prescribed by law and remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino." See Exhibit B (March 7).

Later the same day the minute order reflects the following transaction:

"It appearing through clerical inadvertence the minute order of January 22, 1954 does not properly reflect the order of Court, the Court now orders that the minute order and jacket entry of January 22, 1954 be corrected nunc pro tunc to show, the Court finds the crime to be Burglary of the 'first degree' instead of the 'second degree'." See Exhibit B (March 7).

The only judgment ever prepared in this case recites that petitioner pleaded guilty to the crime of burglary as charged in Count 1 of the information which the court found

to be burglary of the first degree. See Exhibit A (March 7).

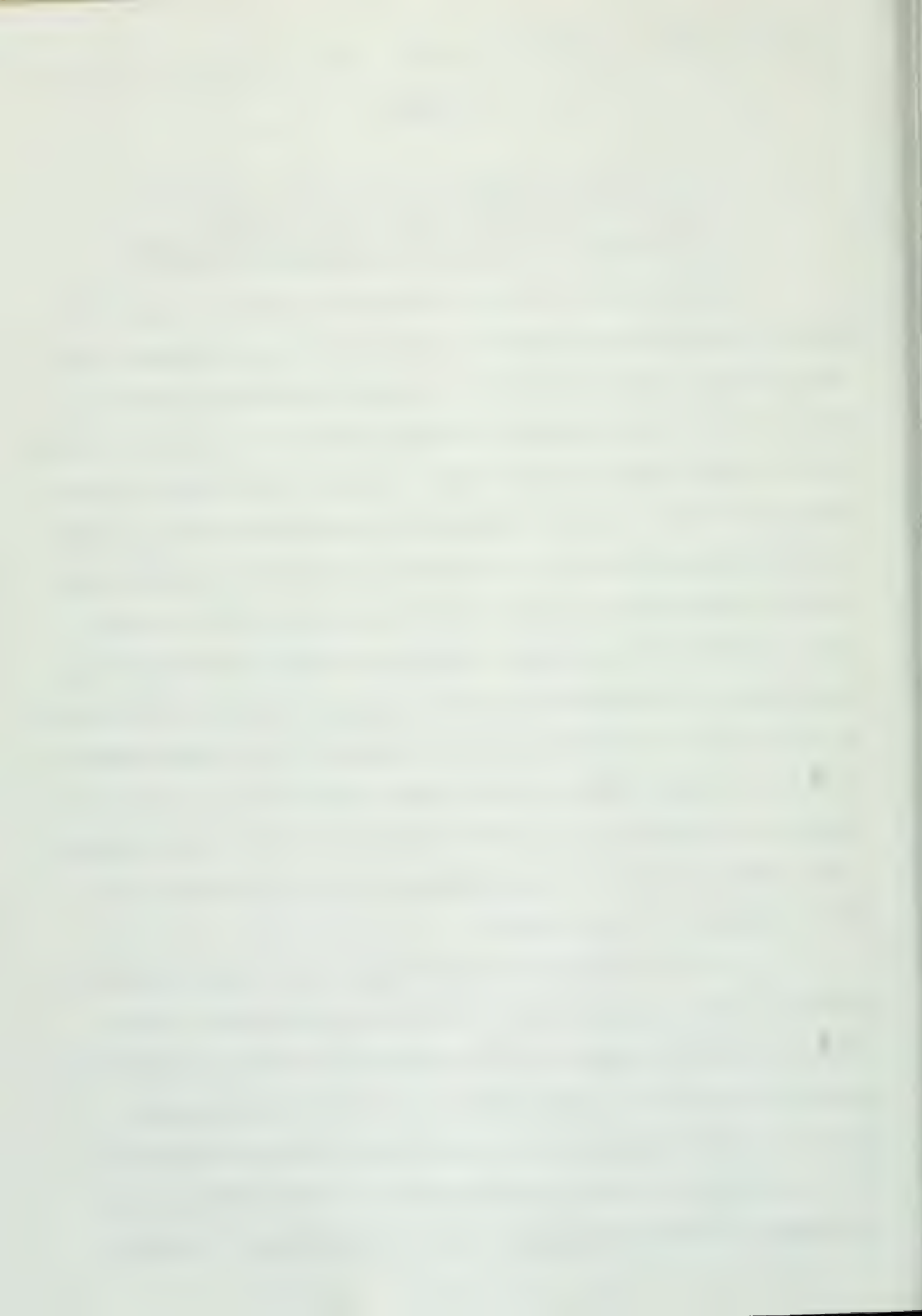
ARGUMENT

I.

THE DISTRICT COURT'S FINDING THAT APPELLANT WAS PROPERLY SENTENCED BY THE CALIFORNIA SUPERIOR COURT FOR HAVING COMMITTED THE CRIME OF BURGLARY IN THE FIRST DEGREE WAS PROPER.

The superior court of California being a court of general jurisdiction, has the power after final judgment and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel, or the court itself so that such records will conform to and speak the truth. It is well settled that orders may be made correcting judgments nunc pro tunc as of their original date without notice and on the court's own motion so as to make them conform to the judicial decision actually made and this regardless of the lapse of time. Meyer v. Porath, 113 Cal.App. 2d 808, 811, 248 P.2d 984, 985-986 (1952). And, when such an occasion arises courts not only have the power to amend such orders and judgments, but are under the definite and manifest legal duty to do so. In re Roberts, 200 Cal.App.2d 95, 97 19 Cal. Rptr. 147, 149 (1962).

It is clear from the wording of the minute order of March 11, 1954, that through "clerical inadvertence," the minute order of January 22, 1954 did not properly reflect the order of the court. Full power in the first instance to determine the character of the error as clerical resides in the trial court, and in the absence of clear showing to the contrary its determination is final. Carpenter v. Pacific



Mutual Ins. Co., 14 Cal.2d 704, 96 P.2d 795 (1939). The superior court has the power on its own motion to correct errors caused by oversight, neglect or accident. Robson v. Superior Court 171 Cal. 588, 590-93, 104 P.2d 8, 9-10 (1915); People v. Curtis, 113 Cal. 68, 71, 45 P. 180, 181 (1896); Wiggins v. Superior Court, 68 Cal. 398, P. 645 (1886).

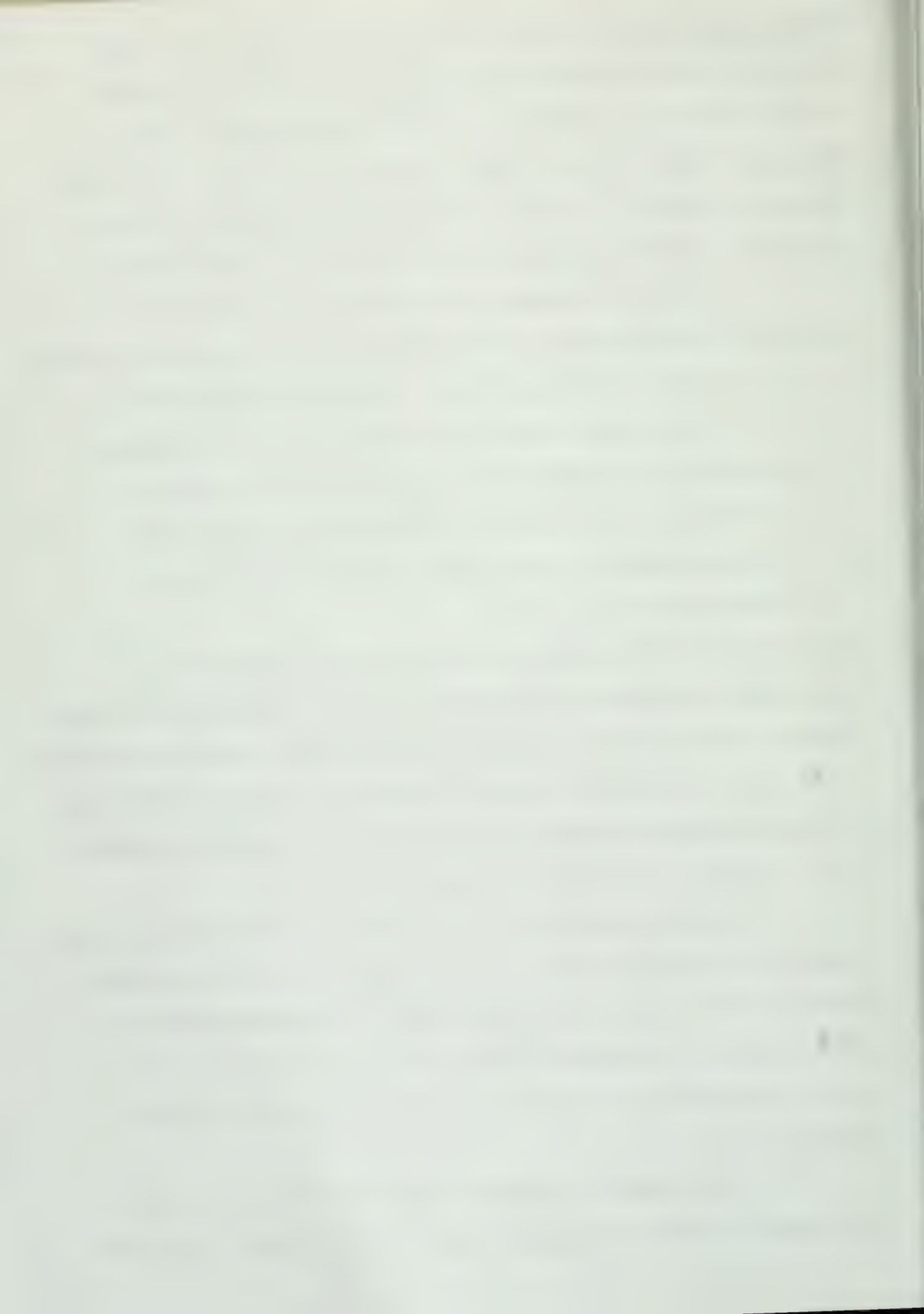
California Penal Code section 460, defines the degrees of burglary and provides in pertinent part as follows:

"Every burglary of an inhabited dwelling house . . . committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person. . . who while in the commission of such burglary assaults any person, is burglary of the first degree."

The reporter's transcript of the testimony presented at appellant's preliminary hearing shows that the burglary herein involved was committed during the nighttime, that the dwelling house was inhabited by Victoria Logan and her son Tommy Logan, and that appellant assaulted Victoria Logan and her husband J. C. Logan. See Exhibit C (July 5).

Hence, upon petitioner's plea of guilty entered on January 22, 1954, to the charge of burglary the trial judge could not have found otherwise than that the burglary was first degree. Wherefore, it was within the power of the court to correct the minute order of that date to reflect that finding.

Petitioner's argument assumes that he commenced to serve a valid sentence for burglary second degree and there-



fore, the superior court could not change the degree of the crime so as to increase his punishment. However, according to California law, petitioner's sentence could not commence until he was delivered to the Director of Corrections. See Calif. Pen. Code § 2900.

Appellant's petition filed with the district court concedes that he was returned to the court within thirty minutes of the initial sentencing. Hence, it is clear that appellant would not be entitled to the relief he seeks upon the grounds asserted because he had not yet begun to serve his sentence and therefore, the superior court had the power to correct its minute order and resentence appellant correctly. See People v. Thomas, 52 Cal.2d 521, 531, 342 P.2d 889, 894-895 (1959) (discussing United States v. Benz, 282 U.S. 304 (1931)).

II.

THE DISTRICT COURT LACKED JURISDICTION
TO GRANT PETITIONER THE RELIEF FOR
WHICH HE PRAYED.

Petitioner commenced service of his sentence on March 18, 1954. If as he contends he was convicted on a plea of guilty to second degree burglary rather than first degree burglary he would not be entitled to his immediate release. Second degree burglary is punishable in California by imprisonment in the state penitentiary for a period of not less than one nor more than fifteen years. See Calif. Pen. Code § 461. Therefore, petitioner would not be entitled to his release until March 18, 1969 even if his contentions were decided in his favor.

Furthermore, petitioner was a fugitive for one year and seven days following his parole revocation in 1964 and hence would not be eligible for discharge pursuant to a second degree burglary conviction until March 25, 1970. See Exhibit E (July 5).

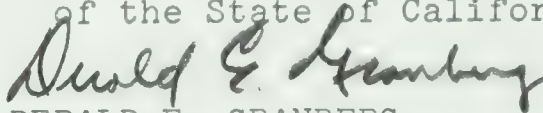
Therefore, since even if all the contentions raised by appellant's petition were resolved in his favor he would not be entitled to his immediate release, the District Court lacked jurisdiction to grant the relief for which he prayed. McNally v. Hill, 293 U.S. 131 (1934).

CONCLUSION

The state has full control over the procedure in its courts, both in civil and criminal cases; subject only to the qualification that such procedure must not work a denial of fundamental rights, nor conflict with specific applicable provisions of the federal constitution. Murphy v. Massachusetts, 177 U.S. 155 (1900). Since the trial court followed state procedures which do not conflict with specific applicable provisions of the federal constitution, no grounds for relief in federal habeas corpus have been stated. See Sampsell v. California, 191 F.2d 721, 725 (9th Cir. 1951), cert. denied, 342 U.S. 929 (1952).

DATED: December 26, 1967

THOMAS C. LYNCH, Attorney General
of the State of California



DERALD E. GRANBERG
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: December 26, 1967

DERALD E. GRANBERG
Deputy Attorney General

NO . 22315 ✓

IN THE UNITED STATES COURT OF APPEALS
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FRANK ZAVLANES ,

Appellant ,

vs .

UNITED STATES OF AMERICA ,

Appellee .

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

APR 11 1968

WM. B. LUCK, CLERK

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NO. 22315

IN THE UNITED STATES COURT OF APPEALS
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FRANK ZAVLANES,

Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty of the offense charged in the one-count indictment, following trial by jury [C.T. 62]. ^{1/}

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2312 and 3231. Jurisdiction of this court rests pursuant to Title 18, United States Code, Section 1291 and 1294.

"C.T." refers to Clerk's Transcript

II

STATEMENT OF THE CASE

Appellant was charged in the one-count indictment returned by the Federal Grand Jury for the Southern District of California. The indictment alleged that appellant knowingly and intentionally transported in interstate commerce a stolen 1964 Oldsmobile automobile from Kansas City, Missouri to San Diego County, California and the appellant then knew the motor vehicle to have been stolen. [C.T. 2].

Jury trial of appellant commenced on April 18, 1967 before United States District Judge James M. Carter. Appellant was found guilty as charged on April 19, 1967 [C.T. 12].

Thereafter on August 29, 1967, appellant was committed to the custody of the Attorney General for five years and the Court denied a motion for judgment of acquittal and a motion for a new trial [C.T. 67].

Appellant subsequently filed a notice of appeal [C.T. 69].

On August 29, 1967, the Court modified the judgment by adding that the appellant may become eligible for parole at such time as may be determined by the Board of Parole as provided under Title 18, Section 4208(a)(2).

III

ERROR SPECIFIED

Points raised on appeal are paraphrased as follows:

1. The Court improperly admitted Exhibit 9 for lack of foundation.

2. There was insufficient evidence to sustain the conviction.

IV

STATEMENT OF THE FACTS

On Friday afternoon, May 6, 1966, appellant was shown a 1964 white Oldsmobile by William Warren, a salesman for Greenlease Motor Company, Kansas City, Missouri. This was the only Oldsmobile Convertible in the used car lot [R.T. 46].^{2/}

Appellant liked the Oldsmobile and wanted permission to take the car on a trial basis. This request by appellant was denied [R.T. 46]. Appellant was not given permission at any time to take the Oldsmobile [R.T. 77].

The car in question was last seen Friday evening by William Davis, another salesman, when the lot was closed [R.T. 34].

The following morning, May 7, 1966, the car was missing from the lot [R.T. 33-34, 37]. William Davis reported the vehicle as stolen to the Kansas City police department [R.T. 42, 77]. Mr. Davis also testified that it was the practice of Greenlease Motor Company to verify the title upon receiving automobiles [R.T. 40].

The stolen report by Mr. Davis was verified by two other officers [R.T. 55, 60].

"R.T." refers to Reporters Transcript

Appellant was in possession of the automobile in California in January 1967 [R.T. 16]. Appellant concedes that he drove the automobile, in question, ^{3/} to California [A.B. 4-5].

The 1964 Oldsmobile Convertible bore Missouri license number 8K 8-445 [R.T. 59]. This license plate was missing from the automobile of Gary Breese of Kansas City, Missouri about November, 1965 [R.T. 19-20]. Mr. Breese first reported the license plate stolen, the next day, but after receiving several warrants for tickets, he and Mrs. Breese went to the Main Police Station and reported the plate stolen again [R.T. 19, 20, 24, 160-162]. The second stolen report was dated April 4, 1966 [R.T. 27, 28]. Neither Mr. Breese nor his wife knew appellant and didn't authorize appellant to use the license plates [R.T. 21, 159].

Appellant admits to working at Redman Plastics, the same place where the Breeses' worked [R.T. 103].

Appellant had a bill of sale, Exhibit 4, in his possession showing the subject vehicle as having been purchased from Nova Car Company, Kansas City, Missouri on December 4, 1966. Appellant could not explain why this plate was used [R.T. 111-112]. Appellant claimed to have purchased the automobile about May 10, 1966 [R.T. 85, 104].

Ralph L. Schoonover, Questioned Documents Examiner testified the original black carbon had been erased and written over with a blue carbon. He noted the original black carbon showing "4D" for four door had not been

erased and "CO" , meaning convertible , had been written in [R.T. 155-157].

Appellant also had a California bill of sale in his possession showing a similar vehicle as purchased from William Reese, 12311 East 24 Highway, Kansas City, Missouri [R.T. 70]. Appellant admits he prepared this document [R.T. 70,100] but told the officers he was just fooling around when he filled out the bill of sale and signed "William Reese" [R.T. 70-71].

Appellant admits to having looked at cars at Greenlease Motor Company [R.T. 110-111].

Appellant testified he traded a De Soto in on the Oldsmobile [R.T.86]. He told his employer, Marvin Barnard, that he traded a Cadillac in on the Oldsmobile and not a De Soto. [R.T. 146]. Appellant says Mr. Barnard is a "real honest person" [R.T. 120].

V.

ARGUMENT

I. EXHIBIT NINE WAS PROPERLY ADMITTED.

Appellant quotes several authoritative sources for the proposition that Exhibit 9 must be authenticated.

Appellant apparently did not consider the "regular course of business" statutory exception to such rule as codified in Title 28, U SCA, Section 1732(a).

In discussing this statute the Supreme Court said,

"The several hundred years of history behind the Act (Wigmore,

Supra, ¶ 1517-1520) indicate the nature of the reforms which it was

designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed."

Palmer v. Hoffman, 318 U. S. 109, 115 (1942)

In a footnote, at 112, among other things, Judge Learned Hand is
ed as saying,

". . . records and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents.

Unless they can be used in Court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only the creditor does a large enough business."

Rule 26, Federal Rules of Criminal Procedure, Title 18, United States
e, gives considerable latitude in admitting hearsay evidence that might
be admissible under the foregoing section.

See the reasoning in the leading 9th Circuit Case of La Porte v. United States, 300 F.2d 878 at 882 (1962), and also see United States v. Gett, 292 F.2d 415, 423 (5th Cir. 1961).

Or, as in this case, to corroborate the oral testimony of a witness.

United States v. Barnard, 287 F.2d 715 (7th Cir. 1961)

In the case at hand, the car was purchased from an Insurance Company
Mr. Hitt. Exhibit 9 corroborates Mr. Hitt's testimony [R.T. 147-152].

Exhibit 9 also corroborates the testimony of Mr. Warren, the automobile salesman. It is contended there was sufficient authentication provided by William Warren, the salesman, for Greenlease, who recognized Wilma E. [redacted]'s signature as billing clerk [R.T. 153]. Mr. Davis, another salesman testified the records in question were kept in the ordinary course of business [R.T. 38].

Documents may be self-explanatory, that is to say, they may provide their own authentication.

United States v. Five Boro Construction Company, 310 F.2d 701, 13 (4th Cir. 1962);

McDaniel v. United States, 343 F.2d 785, 788 (5th Cir. 1965);

Carroll v. United States, 326 F.2d 72, 78-79 (9th Cir. 1965)

Even if it were held that Exhibit 9 was not admissible, does not necessarily necessitate a reversal. There must be a showing of prejudice.

Carroll v. United States, supra at 79;

McDaniel v. United States, supra at 788.

There was no showing of prejudice. The evidence was overwhelming without the documents complained of.

Appellant places great weight to the effect that there is no showing the agents of Greenlease Motor Car Company had authority to bind the company.

Authority to bind the company is not in issue. Persons maintaining records such as bookkeepers and secretaries may or may not be authorized to bind the corporation. The statute merely provides that records maintained in the regular course of business dispenses with the necessity of putting the



authenticating proof in evidence.

II . THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE GUILTY VERDICT.

The law is now clear that on appeal, the evidence is viewed most
favorable to the government.

Glasser v. United States, 315 U.S. 60, 80 (1942).

Conflicts are thus to be resolved in favor of the government.

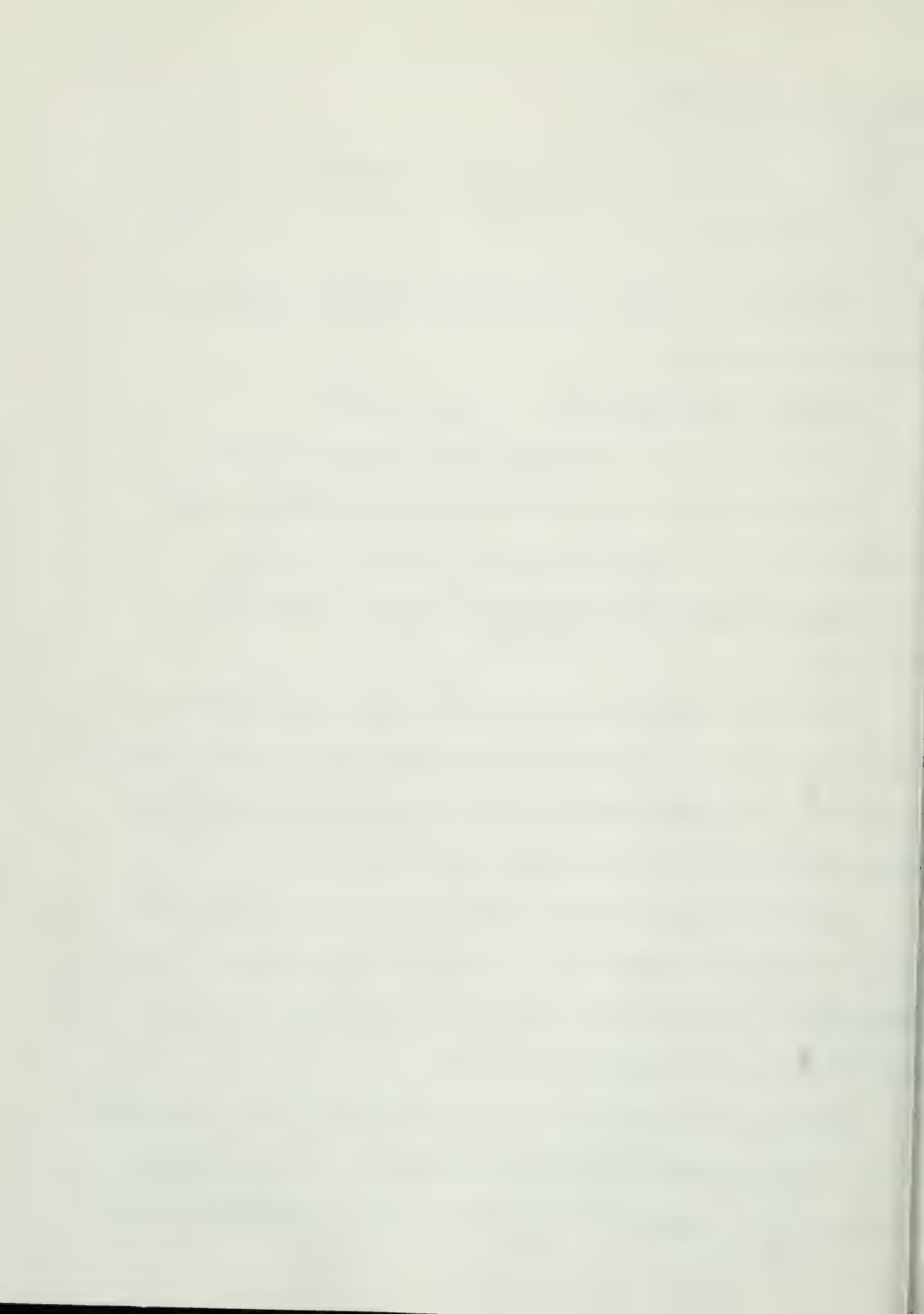
Where sufficiency is attacked on no ground other than excludibility
of evidence found to be admissible, this defense must obviously fail.

Missouri Pacific Railroad Company v. Austin, 292 F.2d 415, 423,
8th Cir. 1961).

There is no conflict that the vehicle in question, a 1964 Oldsmobile
8 Convertible, was on the used car lot of Greenlease Motor Company, Kansas
City, Missouri, the evening of May 6, 1966 and was missing the next day as
testified to by two salesmen of the company [R.T. 33, 34].

There is no dispute, the automobile in question was reported stolen.
This was testified to by William Davis, one of the salesmen, Officer Pumphrey,
a Mesa Police Department, Gary Samuel, and Ronald Philip Klug, Special
agents, Federal Bureau of Investigation.

Appellant concedes he drove the car to California [A.B. 4] and admits
he placed the license plate of Gary Eugene Breese on the automobile prior to
driving the vehicle in question to California [R.T. 15]. Appellant admitted he



obtained the license plate for the purpose of bringing the car to California [R.T. 5]. Appellant testified he borrowed the license plate from Mr. Breese.

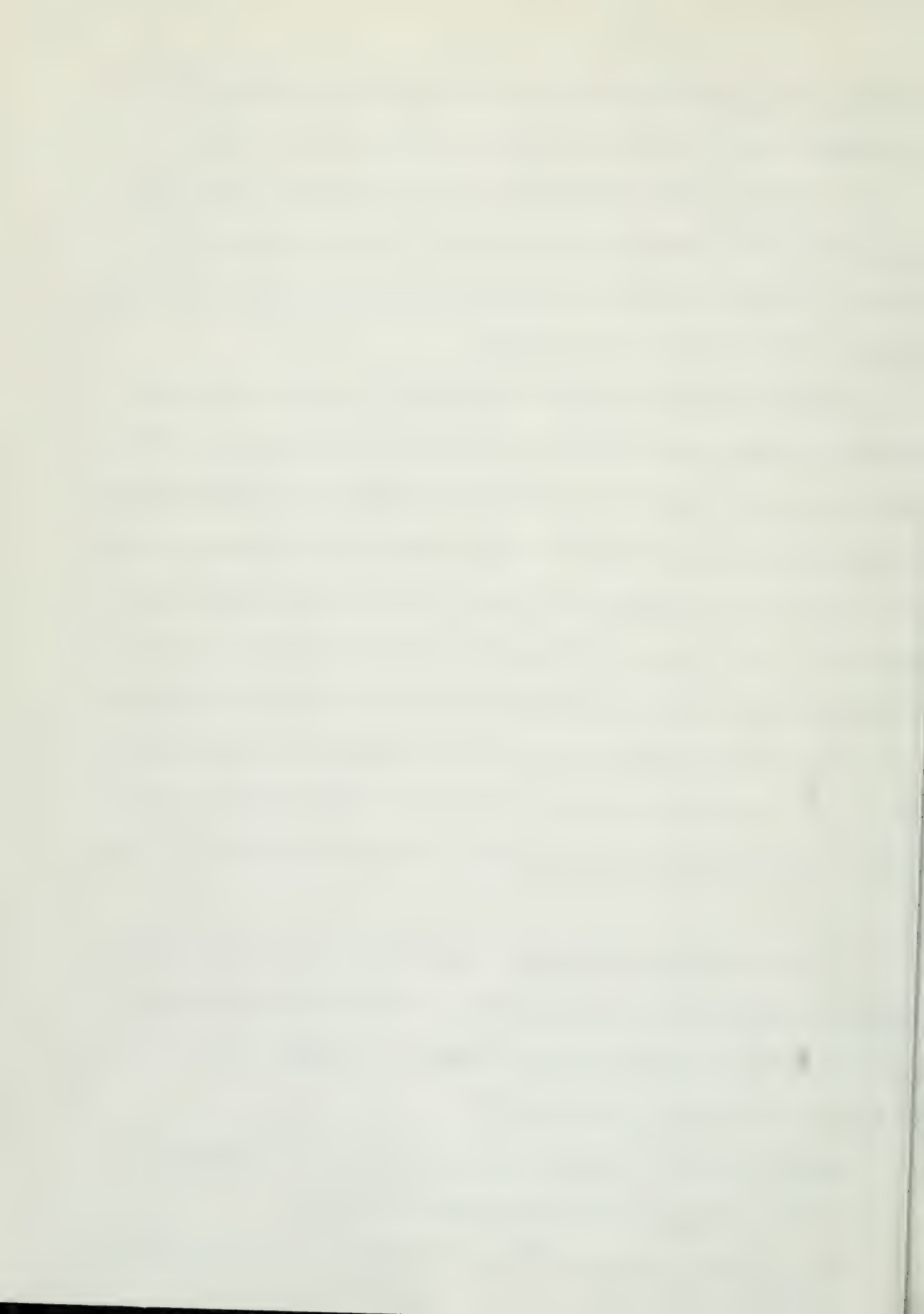
Mr. and Mrs. Breese both testified the license plate disappeared from their car and they first verbally reported it stolen, then later reported it stolen in writing, as Exhibit 2. They did not know appellant nor loan him their license plate. [R.T. 20-22, 26-28, 159, 160-163].

Appellant testified he purchased the vehicle in question from Nova Car Company, Kansas City, Missouri, on May 10, or 12, 1966 [R.T. 85,111]. His proof of this other than his own testimony was Exhibit 4, a chattel mortgage form indicating purchase of the instant vehicle from Nova Car Company. Exhibit showed a date of sale of December 4, 1966. Appellant was unable to explain this date [R.T. 112]. Ralph L. Schoonover, Questioned Documents Examiner, testified many changes had been made to this document and Exhibit 4 had been altered by erasing the original black carbon entries and writing over using blue carbon. He noted that the description of the car was "4D" (four door) in black carbon with "CO" (meaning convertible) written over by blue carbon [R.T. 155-158].

It is noted that appellant also had admittedly prepared a Bill of Sale on California Department of Motor Vehicle Form, Exhibit 5) showing transfer to himself by a Mr. William Reese, Highway Motors, 12311 East 24 Highway, Kansas City, Missouri [R.T. 109, 170-71].

Special Agent Klug, Federal Bureau of Investigation, testified he checked out the address and it was non-existent [R.T. 76].

Appellant further admits that Allied Investment Company told him and



s attorney they had no record of selling him a car [R.T. 112]. If he owed
em money for a car as claimed [R.T. 91] they would have a record.

III. SUMMARY.

The evidence shows appellant in recent possession in California of an
automobile stolen in Kansas City, Missouri, which he admits driving to California.
The evidence further shows appellant was at the used car lot just prior to the
disappearance of the automobile. Appellant worked at the same place the
witnesses worked. Appellant had an altered document and another document, ad-
mittedly false, that he made up himself, to show ownership. His explanation was
entirely unbelievable, particularly with his admitted three prior felony convic-
tions. Appellant was, therefore, clearly impeached by his past record and other
inconsistent statements.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury
verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

SHELBY R. GOTT,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



SHELBY R. GOTT



No. 21175 A-F/
No. 22316 ✓

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In the Matter of

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a corporation,

Debtor and Appellant,

vs.

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OF AMERICA,

WILLIAM N. BOWIE, JR.,

Appellees.

On Appeal From the United States District Court
Southern District of California, Central Division

BRIEF FOR APPELLEE
UNITED INSURANCE COMPANY OF AMERICA

FILED

JUN 18 1969

WM. B. LUCK, CLERK

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No. 22316

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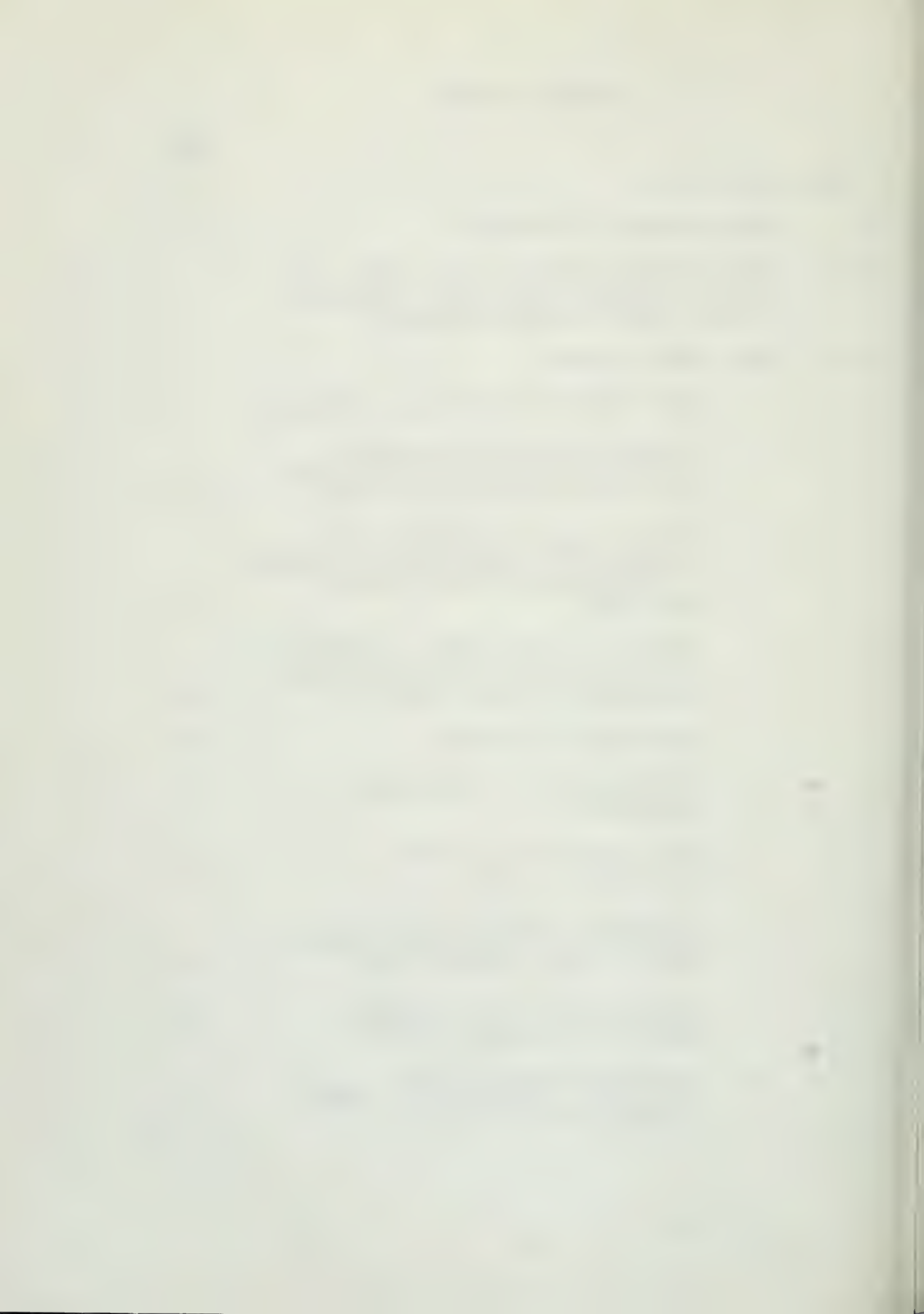
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No. 21175 A-F
No. 22316

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of

THE CALLAND CORPORATION,
a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY
OF AMERICA,

WILLIAM N. BOWIE, JR.,

Appellees.

BRIEF FOR APPELLEE
UNITED INSURANCE COMPANY OF AMERICA

I

PRELIMINARY STATEMENT

Of the seven appeals presented, appellee United Insurance Co. of America (hereinafter United) is interested in only two: the first appeal, which challenges the order of Referee Neukom

removing the restraint against United in its attempt to foreclose its Trust Deed, and the fifth appeal, which challenges Referee Neukom's order quieting title in United to the proceeds of a fire insurance company draft in payment of a loss which occurred on August 5, 1965 before the institution of the State Court receivership proceedings on August 21, 1965.

The first and fifth appeals will be discussed under separate headings. Appellant, in its seventh appeal seeks to involve United; however, we are satisfied that the only part of the seventh appeal that could touch United is res judicata. The situation is this: As pointed out in appellant's brief beginning on page 67, United filed an application with Referee Neukom on November 21, 1966 for an order to show cause for permission to include Trustee William Bowie as defendant in a quiet title action, which United intended to file. This came on for hearing on December 7, 1966; United's petition was granted, and Referee Neukom signed the written order December 21, 1966; appellant took a review, and on February 27, 1967 District Court Judge Irving Hill affirmed the referee's order. Appellant did not take an appeal from Judge Hill's affirmance and said order became final. On April 10, 1967 and after said order became final, appellant, by the stratagem of including all of the papers involved in the previous order to show cause sought to breathe new life into the now final order by making a motion before Referee Neukom requesting his

order directing the Trustee to appear and defend the quiet title action. When the referee denied this motion on May 3, 1967 and signed a written order May 18, 1967, appellant took a review, and on August 22, 1967 Judge Hill affirmed. It is the appeal from Judge Hill's affirmance that is now before this Court as the seventh appeal. In the seventh appeal appellant, in part, seeks to challenge the correctness of the original order granting United permission to join the Trustee as party defendant in the quiet title action. Whether or not Trustee Bowie should have appeared and defended the quiet title action is of no concern to United, because in fact he did not do so. That problem, if there is one, concerns the internal administration of the bankruptcy estate. What did concern United was securing permission to join the Trustee as a party defendant in the quiet title action. That permission was granted, the order was reviewed and affirmed by the District Court and became final. It seems too clear for argument that after once becoming final, the order cannot be reactivated and questioned in this Court by simply including the papers in a subsequent motion, and when that motion is denied, reviewed and affirmed, taking an appeal to this Court.

United will make no attempt to discuss each and every assignment of alleged error presented by appellant, but shall content itself (in accordance with Rule 18[3] of the Rules of this Court] in pointing out references to the record of



substantial evidence relied upon by United as supporting the crucial findings necessary to sustain the order appealed from. We are satisfied, following familiar rules of appellate procedure that United will be entitled to an affirmance of the first appeal if it points out substantial evidence justifying Referee Neukom in terminating the restraints against United in connection with its attempt to foreclose its Trust Deed. Similarly, United will be entitled to an affirmance of the fifth appeal if it points out substantial evidence that Referee Keukom was justified in quieting title in United to the fire loss draft. We believe that United is under no duty to undertake to justify local Rule 218 or any of the other peripheral points raised by appellant, such as the general duties of referees of the District Courts and of this Court in the handling of bankruptcy matters.

For convenience the Clerk's Transcript of the Record in appeals 21175-A-B-C-D-E will be abbreviated "Trans.," followed by the page and lines referred to. The various Reporter's Transcripts will be identified by the date of the hearing and abbreviated thus: "Rep. Tr. 12/29/64" followed by the page and lines referred to.

Before taking up the detailed discussion of the first and fifth appeals, we suggest that both appeals are moot and should be dismissed or affirmed on that ground alone. Admittedly the first appeal involves a restraint against a foreclosure sale

that has long since taken place; the fifth appeal involves the validity of turning over a fire loss draft that was turned over more than two years ago. Clearly the questions raised are moot and following familiar rules the first and fifth appeals should be dismissed on this ground alone. The discussion follows:

II

THE POINTS RAISED IN THE FIRST AND FIFTH APPEALS ARE MOOT, AND BOTH APPEALS SHOULD BE DISMISSED.

The first appeal challenges Referee Neukom's order of February 27, 1965 fixing March 4, 1965 as the day for the removal of all restraints against United in its attempt to foreclose its Trust Deed. One day before March 4, namely, on March 3, District Judge Thurmand Clarke signed an order restraining United until appellant's petition for review to the District Court could be heard. This stay order remained in effect until October 4, 1965 at which time District Court Judge Irving Hill affirmed Referee Neukom and terminated Judge Clarke's order but granted an additional 15 day stay to give appellant an opportunity to appeal and put up a stay bond pending appeal. No stay bond was put up; Title Insurance and Trust Company, the trustee under United's first Trust Deed held the foreclosure sale October 21, 1965, United bid the property in for

\$725,000.00, took possession and operated the property.

Thereafter, on November 2, 1965 appellant filed the first appeal, which has been designated as "appeal from order dated and entered October 4, 1965 and numbered 21175." In other words, the first appeal seeks to question the propriety of an order terminating the restraining order on a sale which has now taken place. This is a classic example of mootness.

The fifth appeal challenges Referee Neukom's order filed April 14, 1966 granting the petition of United for a turn-over order to a fire insurance company draft of \$2,380.30 for a fire loss that occurred at Kon Tiki on August 5, 1964. While a review was taken from Referee Neukom's order (Judge Hill affirmed) no stay bond was put up. In accordance with the order, the draft was endorsed by the Trustee and turned over to United. The fifth appeal, in questioning the validity of the turn-over order is certainly moot in that the draft itself was turned over to United more than two years ago.

It should not require extended discussion or citation of authorities that a court has no power to make an order or a judgment that purports to decide moot or abstract questions.

Particularly in federal courts this is basic since the federal judicial power is, by the Constitution, restricted to "cases" or "controversies."

United States Constitution, Article III, §2;

Willing v. Chicago etc., Ass.'n., 277 U.S. 274;

Okla. City v. Dulick,
(CA Okla 1963) 318 Fed.2d 830;

Nationwide etc. Co. v. Fidelity etc. Co.,
(CA Pa 1961) 286 Fed.2d 91;

United States ex rel. Hoge v. Maroney,
(DC Pa. 1962) 211 Fed.S. 197.

Even the Supreme Court cannot do so.

Collins v. Porter,
328 U.S. 64 (1946).

One of the leading Federal cases establishing the rule that courts will not concern themselves with moot questions is Brill v. General Indus. Enterprises, (3 Cir.) 234 Fed.2d 465. That case involved two actions by minority stockholders to enjoin the sale of a corporation's assets. On demurrer the actions were dismissed and immediately following the dismissal the sale of the corporation's assets was made. An appeal from the dismissal was taken the same day as the sale. In that case the appellee argued that the sale having taken place the appeal was moot and should be dismissed; the appellee stated:

"To hold otherwise would be to give this appeal for which no security analogous to an injunction bond has been posted, the practical effect of an injunction."

The 3rd Circuit agreed stating:

"It is well settled that the mere filing of an appeal, in the absence of a stay of proceedings, cannot operate as an injunction where none has been

granted by the Court below; otherwise stated, an appeal from a decree dismissing a complaint seeking an injunction, or refusing to grant an injunction, will not disturb the operative effect of such a decree, and when the act sought to be restrained has been performed, the appellate courts will deny review on the ground of mootness."

Brill then cites an impressive array of authorities both in the United States Supreme Court and in the Circuit Court. Also cited is a 1935 9th Circuit case, California Canning Peach Growers v. Myers, 78 Fed.2d 194. That case was a petition to enjoin a hearing by a Department of the Federal Government in which the California Canning Peach Growers were involved. The petition for injunction was denied. An appeal was taken. Before the matter reached the 9th Circuit the hearing had been concluded. Held: moot and the appeal dismissed.

A case exactly in point involving the foreclosure of a Trust Deed is Bunn v. Werner (Dist. of Col. Cir. - 1954), 210 Fed.2d 730. The Bunn case sought an injunction to restrain the foreclosure of real estate under a Trust Deed securing an alleged usurious note. At the time of filing the complaint the appellant requested a preliminary injunction against the foreclosure. This was denied and an appeal was taken to the Circuit Court. Before the case was heard in the

Circuit Court the Trust Deed had been foreclosed which fact was admitted by both counsel at the argument. The Court dismissed the appeal, so far as it related to the refusal to grant the preliminary injunction, on the ground that the appeal was moot, the foreclosure having taken place.

A Georgia case close to our facts is Allen v. Smith, (Ga., 1967), 154 S.E.2d 605. In that case appellant brought a petition to enjoin the sale of her property under power of sale in a deed to secure a debt. The trial court granted the restraining order and thereafter continued it in effect on condition that appellant pay \$750.00 into Court and \$250.00 per month thereafter and in the event payment was not made the restraining order was of no effect. After further hearings, the trial court sustained a general demurrer to the petition, an appeal was taken from that order and the order was reversed. The property owner then made a motion for summary judgment in the trial court and the defendant countered with a motion to dismiss on the ground that the matter was moot because the property had been sold after the appellant failed to make the payments due under the Court order. The trial court granted the motion and the property owner appealed. The Appellate Court held the appeal moot and affirmed the judgment of the lower court, stating that the appellee having acquired title to the property, it would be of no benefit to set aside the prior sale.

It would appear therefore that the first and fifth appeals involve only moot questions. If this Court cannot set aside the foreclosure sale (and there is certainly neither pleading nor evidence to justify that) then the secondary questions such as "was appraiser Menick's testimony admissible?" and "Did Referee Neukom give appellant enough time to work out a sale?" lose all significance. Appellant seeks the benefits of a restraining order pending appeal without having put up a supersedeas. This is contrary to law. Similar rules apply to the fire loss draft. Both appeals should be dismissed.

III

THE FIRST APPEAL

A. THE TRUST DEED WAS IN DEFAULT

The first point made by appellant (App.Br. p. 84, commencing line 10) is that the Trust Deed was not in default. Substantial evidence supporting Referee Neukom's finding to the contrary is as follows:

Exhibit "C" (Trans. p. 85) was prepared by S. J. Arcaris, Western Manager of United, he being in charge of the loan. He stated that it was a correct reflection of United's records (Rep. Tr. 1/15/65 p. 41, lines 11-17). Examination of Exhibit "C" shows that the January 1, 1964 payment of \$6,427.00 was made

May 5, 1964, the February 1 payment was made July 27, 1964, and that no payments were made thereafter. Surely this was default, and one long continued -- $10\frac{1}{2}$ months at the time of the January 15, 1965 hearing.

Appellant introduced no evidence on the subject although its counsel claimed it had cancelled checks showing additional payments. It claims lack of due process because it was not given additional time to present this evidence. We suggest there is no substance to this contention for the following reasons:

There is substantial evidence that appellant had more than a reasonable time to put in its evidence that its Trust Deed was not in default. Exhibit "C" was attached as an exhibit to United's replication to the original order to show cause (Trans. p. 69); this was served and filed November 30, 1964. The parties were in court thereafter on December 9th and 29th, 1964 and January 13th and 15th. It was not until the hearing on January 15th that counsel for appellant claimed he did not know that one of the issues before the referee was how much was due on the Trust Deed, and asked for additional time to submit his evidence (Rep.Tr. 1/15/65, p. 57 lines 1-22). The referee properly pointed out that counsel had had Exhibit "C" since the first of December and refused further time. We submit that this is not denial of due process.

Thereafter, in its petition for review filed March 3, 1965 (the first appeal) appellant claimed denial of due process in at least three places; (Trans. p. 239, line 14 to p. 240, line 16; p. 249, lines 11 to 27; p. 253, lines 9 to 28). Following the receipt of this petition for review counsel for United wrote a letter on April 22, to counsel for appellant (Trans. pp. 318-319) criticizing him for making this claim when he had refused to avail himself of the opportunity to present any evidence to United that would indicate that the accounting was incorrect and asking counsel to notify him at once in writing what payment he claimed Calland made on the Trust Deed that United did not give it credit for, or if it had abandoned that contention, let it so state. The answer was a letter from counsel for appellant dated April 12, 1965 (Trans. p. 347) accusing United of bad faith, and stating that Calland's claims would be presented in Court and not in correspondence. It would appear clear that if what counsel for appellant actually wanted was credit for all payments made, that the door was open to him to secure that outside of Court; on the other hand, if what he wanted was further delay, then of course, he was not interested in the offer. As for the question of whether the Trust Deed was or was not in default, the only evidence before the Court established without contradiction that it was in default from March 1, 1964 on -- a full year before the deadline set by Referee Neukom.

Appellant (App.Br. p. 85, line 7) makes the point that "the Referee considered United's incompetent, self-serving letter." This was a letter dated December 4, 1965 written by the attorney for United, circulated to all counsel and a copy sent to the Court, which merely brought the deficiencies on the Trust Deed down to date, and also added a claim for Trustee's fees and Attorney's fees. Counsel for appellant objected that Referee Neukom had taken the letter as evidence and as the basis for his Findings. Referee Neukom replied as follows:

"The Referee: Well, I am taking Mr. Arcaris' testimony today as an amount due and owing. That was his testimony." (Rep.Tr. 1/15/65; p. 56, line 19 to p. 57, line 3). The above exchange between counsel and the Referee establishes that the Referee did not consider the letter of December 4, 1965 as evidence but relied on Mr. Arcaris' testimony as to the amounts due under the Trust Deed.

We submit that the above is substantial evidence that the trust deed was in default.

B. THERE WAS NO AGREEMENT
 BETWEEN CALLAND AND UNITED
 AMOUNTING TO AN ESTOPPEL.

The second point of appellant's argument (App.Br. p. 84, line 16) is that:

"The agreement between United and appellant, that United would not foreclose if appellant performed (and it did) was binding and constituted the basis for estoppel against United from foreclosing its Trust Deed." (The wording "(and it did)" is appellant's.)

The record doesn't even come close to supporting appellant's contention in this regard. On April 17, 1964 Calland wrote S. J. Arcaris asking for a six months' deferment of payment on principal commencing April 1, 1964 continuing to and including September, 1964 (Trans. p. 161); Arcaris replied on April 21, 1964 refusing the plan, but giving Calland 90 days to eliminate the delinquencies, if \$6,420.00 per month were paid for April, May and June, 1964 (Trans. p. 163). Examination of Exhibit "C" (Trans. p. 85) which Mr. Arcaris stated was a correct reflection of United's records (Rep. Tr. 1/15/65 p. 41, lines 11-17) shows that at the time Calland wrote the letter to Arcaris on April 17, 1964 the payment due January 1, 1964 had not been made. Thereafter on May 5, 1964 one payment of \$6,427.00 was made, which paid the payment that was due January 1, 1964. This was the only payment made by Dewey Falcone and Hughes; the only other payment made thereafter was made by Cohen on July 27, 1964 and was applied to the payment that had fallen due February 1, 1964.

This certainly does not show performance by appellant or any facts establishing an estoppel against United.

The Dewey Falcone letter of April 17, 1964, followed by the Arcaris letter of April 21, 1964, both referred to above, must be the so-called agreement between United and appellant referred to, with underlined emphasis by appellant in its brief (App.Br. p. 91, lines 5-10):

"This has been variously noted supra ie.the
agreement between United and appellant,
through its 'new' officers after Geiger and
Brownlee were ousted. Appellant's state-
ments and allegations of this agreement have
never been denied anywhere in the record of
this proceeding, or otherwise, by United."

A statement like this doesn't lead to any conclusion: Certainly United hasn't denied the agreement--it is composed of the two letters mentioned. But whether Calland performed is another matter: Exhibit "C" is an absolute denial that it performed, other than the one payment made May 5, 1964. There are two other payments to be made under the Arcaris proposal; neither were made; instead, on June 1, 1964 the property was sold to Cohen, Dewey Falcone brought Cohen into Arcaris' office and asked him to cooperate with him, which he did (Rep.Tr. 1/15/65, p. 46, lines 6 to p. 47, line 7).

We suggest that the underlined statement almost borders on the ridiculous, and is entitled to no more credence than the statement that immediately preceded it:

"The evidence showed no default by appellant."

(App.Br. p. 91, line 4)

C. UNITED DID NOT CREATE ANY
RESISTANCE, SUSPICION OR ALARM
TO REFINANCING OR SALE ON
KON TIKI.

Appellant makes this statement (App.Br. p. 90, line 23).

"The irreparable damage to appellant is obvious from the fact that Parr did not proceed with the escrow. Efforts to refinance or sell met with resistance, suspicion and alarm, created by United, and perpetuated by the Referee."

There is nothing in the record as to why Parr did not proceed to buy Kon Tiki, nor does appellant attempt to point out any evidence to support that statement. Apparently, it is counsel's conjecture. But the record does establish that if, in fact, the image of Kon Tiki was tarnished, it was not created by United but by appellant and its buyer, Cohen. Appellant seeks to put the onus on United by referring to a declaration by Richard Hagler, (Trans. p. 229) filed in support of appellant's application for suspension, pending review, of Referee Neukom's

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CHICAGO, ILLINOIS
VOLUME 1, NUMBER 1
1971

order removing the restraint against United. This was filed March 3, 1965 (and the part of his declaration appropos the discussion follows):

"That he has made various efforts to effect refinancing or the sale of the property. *** That in making said efforts and in discussing said matters with various lending institutions, including his employer, he was told by various persons that United had made detrimental statements as to the value, rentability and salability of the property and that these statements had been circulated among the financial institutions and had become quite prevalent and had created a serious obstacle to the refinancing and sale of the property. That accordingly, a special, unique and critical situation exists regarding the property which requires and will require special efforts to overcome the bad image, reputation and conditions of said property so as to effect a fair refinancing or sale of the property. That he has a good faith opinion that if permitted a reasonable time, the length of which depends upon the extraordinary circumstances existing in this proceeding and the condition of said property, he can effect a refinancing or sale

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of the property."

The Court will note that this statement is entirely hearsay and being made out of Court in support of a motion was not subject to cross-examination. It certainly is not sufficient evidence to establish the serious charge levelled at United.

However, before discussing the evidence which we believe shows that the bad image originated with Calland or Cohen, not United, it is interesting to note that after this affidavit was executed on March 2, 1965 United was restrained by various orders from foreclosing its Trust Deed until October 19, 1965 (the end of 15 day stay granted by Judge Hill in his order of October 4, 1965) (Trans. p. 484) so it would appear that even though the Courts did grant an additional $7\frac{1}{2}$ month stay, Mr. Hagler was not able to make his refinancing or sale!

In connection with the claim by appellant that it was United that created the resistance, suspicion and alarm, it is significant that the most damaging testimony detrimental to the "image" of the property was brought out by counsel for appellant himself in cross-examining S. J. Arcaris (Rep.Tr. 1/15/65 p. 57, lines 10 to 17):

"Q (By Mr. Falcone): You made many visits to the Kon Tiki during Cohen's occupancy, did you not?

"A. I certainly did.

"Q. Those matters where everything was going on, fights and stabbings and arrest and drunks, all those things were called to your attention, weren't they?

"A. I saw them. They were called to my attention, yes."

It will be noted that the questions asked Mr. Arcaris were leading questions and the derogatory information was supplied in the questions themselves by counsel for appellant.

There is another fact that repudiates appellant's claim that United created the "bad image." On August 31, 1964, the same day that United had Joseph Dunnigan appointed State Court receiver, appellant through its present counsel, filed in the Superior Court of Los Angeles County a lawsuit entitled "The Calland Corporation v. Leonard A. Cohen, et al., being No. 844 870 therein, an action to enforce rescission and to quiet title to the Kon Tiki apartments. A copy of this Complaint is attached to appellant's Debtor's Response to Replication, starting at (Trans. p. 89). The Complaint itself runs from (Trans. pp. 124 to 150 inclusive). Commencing (Trans. p. 140, line 11) appellant levelled serious charges against Cohen and in effect against Kon Tiki itself; in substance appellant

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

IN THE YEAR OF HIS MAJESTY'S REIGN

THE SECOND YEAR OF HIS MAJESTY'S REIGN

THE THIRD YEAR OF HIS MAJESTY'S REIGN

THE FOURTH YEAR OF HIS MAJESTY'S REIGN

THE FIFTH YEAR OF HIS MAJESTY'S REIGN

THE SIXTH YEAR OF HIS MAJESTY'S REIGN

THE SEVENTH YEAR OF HIS MAJESTY'S REIGN

THE EIGHTH YEAR OF HIS MAJESTY'S REIGN

THE NINTH YEAR OF HIS MAJESTY'S REIGN

THE TENTH YEAR OF HIS MAJESTY'S REIGN

THE ELEVENTH YEAR OF HIS MAJESTY'S REIGN

THE TWELFTH YEAR OF HIS MAJESTY'S REIGN

THE THIRTEENTH YEAR OF HIS MAJESTY'S REIGN

THE FOURTEENTH YEAR OF HIS MAJESTY'S REIGN

THE FIFTEENTH YEAR OF HIS MAJESTY'S REIGN

THE SIXTEENTH YEAR OF HIS MAJESTY'S REIGN

THE SEVENTEENTH YEAR OF HIS MAJESTY'S REIGN

THE EIGHTEENTH YEAR OF HIS MAJESTY'S REIGN

THE NINETEENTH YEAR OF HIS MAJESTY'S REIGN

THE TWENTIETH YEAR OF HIS MAJESTY'S REIGN

THE TWENTY-FIRST YEAR OF HIS MAJESTY'S REIGN

THE TWENTY-SECOND YEAR OF HIS MAJESTY'S REIGN

alleged:

Cohen wasted, destroyed the property and continued to do so; that he converted and removed dishwashers, air conditioners, refrigerators and other personal property; that he so mismanaged and operated the property as to seriously damage its character and reputation as good residential property and has brought it into disrepute by purporting to employ misfits and undesirable characters including alcoholics, criminals and persons of questionable character, to work in and about the property and to associate and deal with the tenants, giving them free apartments and feeding them, so using about 14 apartments without rent or income; permitting the said purported employees, in and about the property, to drink to excess, to engage in brawls and fights, including with Cohen, to violate various ordinances and laws, including the peace and quiet and criminal assaults, one of them stabbing another in an apartment so occupied by them; Cohen caused the tenants to be fearful and apprehensive of their welfare and safety and caused the property to be under almost constant surveillance by the police;

Cohen had personally, and permitted and directed said employees and others, to mistreat and abuse tenants and unlawfully lock tenants out of their apartments and moved tenants from apartment to apartment without reason against their will and at his whim, and converted the personal property of tenants; an arson-caused fire occurred in one of the apartments resulting in substantial damage to the property; Cohen violated various ordinances and laws including health laws permitting and even causing the violation of criminal ordinances and laws including disturbance and breaches of peace, drunkenness, felonious assaults and stabbing and violent fights.

These charges in a verified Complaint, prepared by present counsel for appellant, spread upon the public records the same day that United had the State Court receiver appointed, would appear to place the blame for any damage to the "image" of Kon Tiki Apartments on appellant rather than on United. On the assumption that the verified allegations are true, and S. J. Arcaris testified he had personal knowledge of some, no one could seriously question the right of United, after serious and repeated defaults on its Trust Deed had occurred, to insist that it be paid its obligation rather than refinance the property to some new buyer, certainly one as ephemeral as Mr. Parr.

D. THERE IS SUBSTANTIAL EVIDENCE
 TO SUPPORT REFEREE NEUKOM'S
 VALUATION OF \$870,000.00.

Commencing (App.Br. p. 86, line 26) the appellant mounts a determined attack on the Referee's valuation of \$870,000.00 (Rep.Tr. 1/15/65, p. 56, lines 8-9). As appellant points out, there were several figures submitted.

There was a Marshall & Stevens appraisal made before the buildings were built, based on the plans and specifications, which fixed the value at \$1,125,000.00 (Rep.Tr. 1/15/65, p. 34, line 12).

Leonard A. Cohen, who seems to have been the villain in the piece, and who had little or no qualifications as an appraiser, first testified that he placed a value of possibly a total of \$800,000.00 on the property (Rep.Tr. 12/9/64, p. 34, lines 4-5) and then later under prodding of counsel for appellant and confronting him with a cross-complaint he filed in an action brought by the Calland Corporation, stated that his opinion was that the property was worth \$1,500,000.00 (Rep.Tr. 12/9/64, p. 36, lines 17-19). Ivor H. Fisher, a witness on behalf of appellant gave several figures, \$1,150,000. (Rep.Tr. 1/13/65, p. 10, line 23), \$963,755.00 (p. 12, line 4) and \$1,200,000.00 (p. 13, line 2), however, it appeared that he had had his own business only eight months (p. 14, lines 9-10) and had never appeared in Court before (p. 14, lines 23-24).

Furthermore, he used a figure for taxes of \$14,685.00 when actually the taxes were \$21,707.00 as testified to by S. J. Arcaris. When he was asked to give an appraisal with the correct amount of taxes he was unable to do so (p. 101, lines 1-8).

Regardless of the different opinions expressed, the ultimate question before this Court is whether or not there is substantial evidence to support Referee Neukom's findings of \$870,000.00. There is such substantial evidence, and it falls into three categories: the sale to Cohen, June, 1964; Mr. Menick's appraisal, and the proposed sale to Charles H. Parr.

1. THE SALE TO COHEN:

Counsel for appellant, kept insisting before Referee Neukom, that Cohen paid \$860,000.00 for Kon Tiki. For instance at (Rep.Tr. 12/9/64, p. 17, line 13) he said:

"Now the insurance company tells you it has bid (\$815,000.00) because that's the purchase price Cohen agreed to pay. That isn't true. That isn't what he agreed to pay. It is \$860,000.00."

It is true Cohen agreed to pay \$860,000.00 but this included some \$45,000.00 of furnishings, and furniture which was being purchased on contract. In other words, he and Cohen

assumed that Cohen would pay those contracts, but he only agreed to pay \$815,000.00 for the real property. See (Trans. p. 133, lines 13-23) where it is alleged in the verified Complaint filed by counsel for appellant on behalf of appellant.

"* * * on or about June 1, 1964 plaintiff agreed to sell to defendant the property * * * for the price of \$815,000.00 plus defendant's assumption and payment of all of the furniture and fixture leases and conditional sales contracts of the estimated balance of \$46,381.03 * * * ."

So, Referee Neukom had evidence of an actual sale of the property covered by the Trust Deed for \$815,000.00 approximately six months before.

2. APPRAISER A. S. MENICK'S TESTIMONY:

Mr. Menick's testimony appears (Rep.Tr. 1/15/65, pp. 4-31). He appraised the property at \$850,000.00 (p. 6, lines 21-22). Mr. Menick was appointed by Referee Neukom (p. 5, lines 11-13). He could hardly be accused of being prejudiced in favor of one party or the other; his qualifications were substantial; he's been appraising both real and personal property in the United States District Courts for the past 27

years (p. 4, lines 13-15).

Mr. Menick was an independent appraiser appointed by the Court (p. 6, lines 15 to 16) by the cost approach method he reached a valuation of \$875,000.00 but by the income approach he reached a valuation of \$861,450.00 reduced that to \$850,000.00 because of the vacancy factor being greater than normal and because the conditions of the apartments, a good many of them being in an unrentable condition at the time he looked at them (p. 16, line 25 to p. 17, line 8). Mr. Menick had lived in the vicinity since 1918, was 69 years old, and since 1952 or 1953 when he started to number them he had made approximately 3,000 appraisals as an appraiser with the various District Courts and Bankruptcy Courts; he had appraised apartment houses such as this one before.

Although counsel for appellant attempted to belittle Mr. Menick, his qualifications and his efforts, this Court will find on reading his entire testimony that he gave the appearance of a careful witness, well versed in practical appraising, and that his appraisal of \$850,000.00 is entitled to great weight.

3. THE PROPOSED SALE TO CHARLES H. PARR:

The proposed sale to Mr. Parr was for \$900,000.00, Mr. Stein, the Broker, said he would charge \$30,000.00 in

commission. Referee Neukom subtracted the \$30,000.00 from \$900,000.00 arriving at the net figure to the estate of \$870,000.00. He fixed that figure as the top value of this particular property (Rep.Tr. 1/15/65 p. 56, lines 8-16).

We submit that these three factors; the sale to Cohen in June, 1964 for \$815,000.00, the appraisal by the Court-appointed appraiser A. S. Menick of \$850,000.00 and the proposed sale to Parr with a net of the estate of \$870,000.00 is substantial evidence supporting Referee Neukom's determination that the Kon Tiki had a value of \$870,000.00.

E. REFEREE NEUKOM WAS NOT
ARBITRARY IN SETTING MARCH 4,
1965 AS THE CUT-OFF DAY.

Scattered throughout appellant's brief, and it is stated in a half dozen different ways, is the claim that Referee Neukom was arbitrary in fixing March 4, 1965 as the cut-off date for the removal of restraints against United in its attempts to foreclose its Trust Deed. This brings into focus whether or not there is any substantial evidence in the record to support Finding XI, (Trans. p. 210) as follows:

"That it is true that the failure of the debtor to cure the default which has existed on United's first Trust Deed since March 1, 1964 has continued for an unreasonable length of time and

that the right of United to foreclose its first deed of trust has been delayed for an unreasonable length of time and that it would be unjust and inequitable to restrain United further beyond the date of March 4, 1965 at 12 o'clock noon."

Coupled with this and properly considered together ;
is the next Finding, XII as follows:

"That it is true that the debtor has undertaken certain proceedings to consummate a sale of the debtor's real property to one Charles H. Parr at a figure stated to be more than sufficient to pay in full all sums due and owing under United's first Trust Deed and all other secured and unsecured creditors of the debtor. That it is true that the period of time between January 15, 1965 and March 4, 1965 at 12 o'clock noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

The Court found on the basis of the uncontradicted Exhibit "C" (Trans. p. 85) in Finding VII, (Trans. p. 208) that the December 1, 1963 payment on United's Trust Deed was not made until March 6, 1964; that the January 1, 1964 was not made until May 5, 1964; that the February 1, 1964 was not made until July 27, 1964; and that the appellant was in default

from March 1, 1964 to date of the findings, February 17, 1965. In other words, the last payment which United had received was made on July 27, 1964 from Leonard Cohen and this was applied to the February 1, 1964 payment. The Court found that Exhibit "C" was a correct recapitulation of the payments made on the Trust Deed (Trans. p. 208, lines 23-28).

We consider the following to be substantial evidence to support Referee Neukom's findings both as to unreasonable delay and as to a reasonable length of time to work out the Parr deal.

1. THERE WAS UNREASONABLE
DELAY IN CURING DEFAULT.

An analysis of Exhibit "C" demonstrates that almost from the first the payments were delinquent. The second payment was more than two months delinquent, the fourth payment was more than three months delinquent, the fifth, three months, the sixth, two months, the seventh, two months, the eighth, three months, the November 1 payment was three months delinquent and the December 1, 1963 payment was not made until March 6, 1964. In April, payments toward the taxes were made but no payments on the principal. It was in this context that the exchange of letters between Dewey Falcone and S. J. Arcaris took place (Trans. pp. 161-163).

In other words, notwithstanding the bad payment record, United was willing to postpone the January, February and March payments for 90 days providing the April, May and June payments were made on time. And from the substance of the Arcaris letter apparently there was a second Trust Deed deal being contemplated that would make this arrangement feasible. We see nothing about this that would indicate a "pound of flesh" attitude on United's part. However, Falcone and Hughes did not avail themselves of that offer; they made only one payment on May 5, 1964, which was applied to the January 1, 1964 payment. The sale to Cohen then came into the picture as of June 1, 1964. Dewey Falcone, President of Calland brought Cohen into S. J. Arcaris' office and asked Mr. Arcaris to cooperate with him, and agreement was made to allow Cohen to pay the July payment in full and thereafter pay only interest for five months. Testimony establishing this appears in (Rep.Tr. 1/15/65, p. 46, line 10 to p. 47, line 9) as follows:

"Q. By Mr. Falcone: Now when you accepted the notice of rescission by Falcone's office rescinding the Cohen transaction, I came there with the people I just mentioned forthwith; and I asked whether you would cooperate with The Calland Corporation, and you told me that you would not consider Calland at all but you

preferred Cohen; is that right?

"A. By S. J. Arcaris: No, I told you --

"Q. Didn't you say you preferred Cohen?

"THE REFEREE: Please permit him to answer the question.

"THE WITNESS: Mr. Falcone, I told you I could not deal with The Calland Corporation at that time because I was under written agreement with Cohen. This man you brought in asked me to cooperate with --

"Q. Did I bring him?

"A. Mr. Dewey Falcone did.

"Q. You made an agreement --

"A. Yes.

"Q. -- giving him the privilege to pay only interest?

"A. That's right.

"Q. And did he live up to that agreement?

"A. Just a minute. He was given the privilege to pay the full amount in July and then interest from there on for about five months.

"Q. All right. The escrow was not closed until December."

Further examining Exhibit "C" (Trans. p. 85) we see that when Mr. Arcaris made this agreement with Cohen about



June 1, 1964 to provide that July's payment be made in full and thereafter pay only interest for five months, the February, March, April, May and June payments had not been made; the last one he received had been \$6,427.00 on May 5, 1964 and this had been applied to the January 1, 1964 payment. Exhibit "C" reflects that the payment due from Cohen on July 1, was not made until July 27, and that thereafter there was neither interest or principal paid on this obligation. When Calland and Cohen began having difficulties between themselves, and sending notices to the tenants not to pay the other, and with drunkenness, fights and brawls taking place at Kon Tiki, the State Court receiver was put in August 31, 1964. We feel that the above facts and circumstance constitute substantial evidence in support of Referee Neukom's findings:

"that the failure of the debtor to cure the default which has existed on United's first Trust Deed since March 1, 1964 had continued for an unreasonable length of time and that the right of United to foreclose its first deed of trust had been delayed for an unreasonable length of time and that it would be unjust and inequitable to restrain United further beyond the date of March 4, 1965 at 12 o'clock noon."

2. REFEREE NEUKOM GAVE
CALLAND A REASONABLE TIME
TO WORK OUT A SALE:

There is substantial evidence in support of Referee Neukom's Finding XII: "that the period of time between January 16, 1965 and March 4, 1965 at noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

The sale to Parr developed this way:

At the hearing of December 9, 1964 before Referee Neukom, Hubert Laugharn, one of the attorneys for appellant at that time, stated to the Court:

"I say this: I am informed by the President of the company that he has been negotiating for the sale of the property and that he has convinced the parties that this Court can give good title." (Rep.Tr. 12/9/64, p. 59, lines 23-26).

The question was then discussed as to allowing appellant a reasonable time to finalize the offer. In connection with this the Referee called S. J. Arcaris to the stand to determine the amount due at that time; Mr. Arcaris stated the amount to be at least \$723,320.35 (p. 63, line 12) and then, after Mr. Arcaris stated that Exhibit "C" was a true reflection of the information contained in the books and records of United, the Referee asked

THE HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1800

The city of Boston, founded in 1630, was the first of the New England colonies. It was the first city to be founded by Englishmen in North America. The city was founded by a group of Puritans who had fled from England to escape religious persecution. They were led by John Winthrop, who gave the city the name "Boston" in honor of his friend, the English statesman John Dudley, Earl of Devonshire.

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him this question:

"Q. You don't need to answer this question, but if this loan was repaid to you say within six weeks would you be willing to forego possibly some of these penalties? You don't need to answer that unless you --

"The Witness: I'll answer it, I think we would, yes.

"Q. (by Referee) You don't want the property?

"A. We certainly do not. We are not in the real estate business.

"Q. Would you like to put this money into circulation?

"A. Absolutely, that is our only concern."
(p. 63, line 15 to p. 64, line 14).

The Referee after further colloquy about the continuance stated:

"I feel this way: if this matter is continued to Monday, December 28, and if by that time there has not been brought forward something which indicates a sale in substantially the amount as is indicated, I would then feel inclined to lift all restraints and let the foreclosures go as they might.



" I don't know whether there will be any such offer produced but I feel inclined to accept as of today the statements that have here been made and the testimony that the sums indicated are due and owing.

" I feel inclined to continue this hearing mainly the restraining orders until after the hearing on Monday, December 28." (p. 68, lines 6-18).

After further discussion this took place:

"The Referee: I could have it on Tuesday, December 29 at 2:00 p.m.

"Mr. Falcone: Your Honor

"Mr. Laugharn: Did the Court fix the hour?

"The Referee: 2:00 p.m.

"Mr. Falcone: The debtor appreciates this and thanks you for it." (p. 69, lines 10-16).

And further on:

"The Referee: Surely in twenty days if you have anybody interested they are either going to say yes or no.

"Mr. Falcone: Right, Right.

"The Referee: I don't feel I should restrain



a foreclosure of this size indefinitely." (p. 70, lines 14-19).

And at the conclusion of the hearing

"The Referee: Very well, we all agree that this matter is continued to the afternoon at 2:00 p.m., Tuesday, December 29. All restraining orders are to remain in force and effect until after the hearing then to be conducted. We are in recess." (p. 72, lines 2-8).

The next hearing was on December 29, 1964 at 2:00 p.m.

At the commencement of the proceedings, Mr. Laugharn, one of the then attorneys for appellant stated:

"Mr. Laugharn: If the Court please I don't know if you recall, but it was to this continuance the Court directed that there be the showing of the possibility of the sale of this matter. It went over on that condition." (Rep. Tr. 12/29/64, p. 4, lines 8-11).

Mr. Dewey Falcone, President of Calland then told Referee Neukom that he had an offer to purchase by Mr. Charles H. Parr, that Mr. Parr was represented by a broker by the name of Robert Stein who was familiar with the property, looked at the property and that time gave me an offer to purchase, (At a later hearing on January 13, 1965, it developed that Stein had

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actually never seen the property but that he thought that Mr. Parr had seen the property, but he wasn't too sure (Rep. Tr. 1/13/65, p. 45, lines 2-6). Mr. Dewey Falcone stated the purchase price at \$900,000.00 and that \$5,000.00 had been deposited in escrow. He presented a copy of the escrow instructions and the Referee then asked counsel for United what their position was? Counsel replied:

"Mr. Kelly: Well, your Honor, we start with the idea that United doesn't want the property. All we want is the money. Now we realize that this so called escrow looks as if it is a deal, but there are two or three escape clauses it in. For instance, one is subject to the examination of the operating expenses statement on the property. If the proposed buyer does not like the looks of the operating expenses, he can take his \$5,000.00 and walk away." (p. 6, lines 1-16).

After further discussion counsel for United made this statement:

"But if the Debtor believes that it can work out a deal here and wants to take a try at it, we don't want to be obstructionists except that we think that some reasonable time limit, and the time that I was speaking of around the courtroom before your Honor took the Bench, was the time

of 45 days. Mr. Falcone said he thought he would not have any trouble reducing this 90-day escrow to 30 days to give them the time to try to work out all these various conflicting claims with the understanding that if at the end of 45 days he had not completed this proposal, that we would then go ahead and sell." (p. 8, lines 7-17).

The Referee thereupon continued the restraining orders to remain in effect until Wednesday, January 13, 1965 at 2:00 p.m. (p. 23, lines 3-5).

A discussion of what additional time would be necessary to work out the sale covers several pages of the Reporter's Transcript of the January 13 hearing. Counsel for appellant stated that 45 or 60 days would not be unreasonable (p. 29, line 11) and further on that he would stipulate that if Referee Neukom would give the debtor 45 days or "a reasonable time 45, maybe 50, maybe 60 days, at the end of that time if it was not consummated then Your Honor could do what he pleases about it. We would abide by Your Honor, subject to review, of course." (p. 34, lines 5 to 11). Later on Mr. Stein, the Broker, consulted with counsel for appellant, and counsel for appellant then stated to the Court "Mr. Stein suggests 60 days, if possible; if not, 45 days." (p. 36, lines 13-14). Counsel for appellant after other questions, asked Mr. Stein:

"Q. By Mr. Falcone: Do you want reasonable time to consummate this sale?

"A. I would like it, sir, yes, sir.

"Q. How much time is reasonable time?

"A. 45 days was suggested here, yes, sir." (p. 39, lines 12-16).

On redirect examination, counsel for appellant questioned Mr. Stein further in this regard:

"Q. By Mr. Falcone: You are not limiting yourself just to refinancing? You are going to try to do everything you can to work this out for Mr. Parr's purchase?

"A. I would like to make a deal, yes, sir.

"Q. Do you feel reasonably certain if given 45 days you can do so?

"A. I believe so, sir." (p. 64, lines 11-17).

In further discussion of the request for further time Mr. Laugharn, one of the attorneys for appellant, made this statement:

"This case must reach its end in some manner. There is nothing in this case unless the debtor can bring forward a sale all the way down the line. On the other hand, being in the same shoes as Mr. Kelly in these two matters, I appreciate his concern. After all, all he has

asked here is expedition and a final result,
and to have it, when it comes to a final result,
with either a payoff or foreclosure." (p. 109,
lines 6-12).

The January 13 hearing was then continued to January
15, at 10:00 a.m. (p. 114, lines 3 and 4).

Appraiser A. S. Menick, appointed by Referee Neukom,
was heard on January 15, 1965; S. J. Arcaris brought the
deficiency down to date, and Referee Neukom continued the
restraint until March 4, 1965 to give appellant an opportunity
to work out the sale. The substance of the above evidence
demonstrates that appellant's claim that Referee Neukom did
not give it a reasonable time to work out a sale is without merit.
Appellant asked, on January 13, for 45 days; Referee Neukom
gave it 50 days. On the 49th day Judge Clark restrained United
further until Referee Neukom's order could be reviewed.
Judge Hill affirmed the Referee on October 4, 1965, and granted
an additional 15 day stay. The end result was that appellant,
after having assured Referee Neukom that if it were granted
45 days and at the outside 60 days, it would be able to work
out the sale, in fact, by a series of restraining orders, was
actually given 279 days before the restraint against foreclosure
was actually lifted. We feel it is self-evident that if Mr. Parr,
in good faith, ever intended to buy this property, he had plenty
of time to go through with the deal. Furthermore, the fact

that he did not go through with the deal in the succeeding 279 days leads to the practical conclusion that Referee Neukom was right when he held that 50 days was a reasonable time. Figuring it another way: Mr. Parr's deal went into escrow December 28, 1964 (Rep.Tr. 12/29/64, p. 5, lines 14-17) so that when Referee Neukom finally fixed March 4, as the cut-off date, appellant actually has been given 65 days within which to complete the escrow. Certainly there was not an unreasonable time under the circumstances.

It is submitted that all of the foregoing is substantial evidence supporting Referee Neukom's Finding XII (Trans. p. 210). "That the period of time between January 15, 1965 and March 4, 1965 at noon is a period of time reasonably sufficient to allow the debtor to consummate said sale."

While it would be elementary that each case must be decided on its own facts and circumstances, Referee Neukom's ruling is not inconsistent with adjudicated cases.

A 9th Circuit case in many respects like the present one is Mundt v. Home Fed. Savings & Loan Assn., (9th Cir., 1965), 349 Fed.2d 938. Many facets of the Mundt case are similar to ours. The lender Home Federal, after repeated defaults, filed a notice of foreclosure; one day before the sale was to have taken place the debtor initiated Chapter XI proceedings and the foreclosure was restrained; after repeated hearings and a long period of time, the Referee vacated the

restraining order, but reinstated it pending review. The debtor raised constitutional questions and claimed abuse of discretion by the Referee in terminating the restraining order. While few facts are recited in the opinion the Court held that there had been no violation of the debtor's rights and no abuse of discretion by the Referee.

The Mundt case had an interesting aftermath in that the same property found its way into the California State Courts in Zaluskey v. Mundt, (1966) 240 Cal. App. 2d 713. The opinion in Zaluskey indicates that after the Referee vacated the restraining order against foreclosure, the District Court affirmed the Referee's order, and denied the Mundt's application for rehearing and for stay of execution pending appeal to the Ninth Circuit. The Zaluskeys bought the property in a sale by the Trustee under the Deed of Trust about two months after the order was vacated and while the appeal was going up to the Ninth Circuit. The Zaluskeys brought the unlawful detainer action against the Mundts, who were still in possession, somewhat as United has been compelled to bring a quiet title action against the appellant and others in order to get a title policy. (See seventh appeal pending herein).

The Court in Zaluskey made this statement: "The decision of the referee, however, to vacate the order restraining enforcement of the secured lien was as discretionary as it was initially to enjoin such proceeds.", citing In re Holiday

Lodge, Inc. (7th Cir., 1962) 300 Fed.2d 516.

Holiday involved an appeal not because a restraining order had been dissolved, but because it had been continued. In that case, which involved a foreclosure of a Trust Deed, the Referee had refused to continue the restraining order in a Chapter XI proceeding after six months; a review was taken to the District Court and the District Court held a de novo hearing and reversed the Referee and continued the restraining order in effect. The holder of the trust deed took an appeal to the Seventh Circuit contending that, with the exception of discretion to grant short preliminary restraining orders in order to give the debtor the time to work out an arrangement, the Bankruptcy Court had no jurisdiction to grant a restraint against a secured creditor. The Seventh Circuit reversed the District Court, terminated the restraint, and gave an interesting discussion of the nature of the Chapter XI proceedings. The Court held that the Chapter XI proceedings are only for the purpose of protecting the unsecured creditors and are not intended to be used as a vehicle for changing or modifying or restraining the rights of the secured creditors.

We think that this was the point of digression between Mr. Hubert Laugharn, who acted as one of the attorneys for appellant in the preliminary stages of the proceedings before Referee Neukom, and Mr. Falcone, who appeared also and who later took over the entire matter on behalf of the appellant. We

believe it is evident from the remarks of Mr. Laugharn heretofore mentioned (Rep.Tr. 1/13/65, p. 109, lines 6-12), that he recognized the limitations of the nature of Chapter XI proceedings as it related to the jurisdiction of the Referee to continue for an unreasonable length of time the restraints against the holder of the first Trust Deed in the enforcement of its rights. Obviously, present counsel for appellant has never recognized this and still asserts the contrary vehemently, seeming to attempt to persuade this Court that the nature of the Chapter XI proceedings is such that the secured creditors may be indefinitely restrained from asserting their rights, if thereby, the unsecured creditors may possibly be helped.

Zaluskey is also interesting on the question of mootness. It held that by the time the Trustee (under the trust deed) sold the property, the Federal Bankruptcy Court had withdrawn its jurisdiction over the res and jurisdiction had reverted to the State Courts. The Court further held that it appeared that the Mundts' failure to obtain a stay pending appeal made the question moot, citing Brill v. General Industrial Enterprises, supra.

IV

THE FIFTH APPEAL

The fifth appeal challenges the order of Referee Neukom made April 14, 1966 quieting title in United to a fire insurance draft for \$2,380.30. The fire had occurred August 5, 1964 (before United instituted the State Court receivership on August 31, 1964) and at the time of the hearing on the motion the premises were still unrepaired (Trans. p. 724, lines 22-28).

There is substantial evidence to support Referee Neukom's order that United was entitled to the draft.

1. Exhibit U2 introduced at the hearing of March 31, 1966 was a rider attached to the insurance policy of General Accident-Potomac together with the Lender's Loss Payable Endorsement. This rider specifically insured both Kon Tiki and United as their interests might appear.

2. Exhibit U1 introduced at said hearing was a photo-print copy of United's Deed of Trust dated January 10, 1963. As a matter of convenience, rather than examine the exhibit itself, this Court will find the specific provision involved at (Trans. pp. 745 and 746). In substance the Trust Deed provided that the borrower was required to maintain fire insurance; it also provided:

"The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at the option of Beneficiary the entire amount so collected or any part thereof may be released to Trustor."

3. The Findings (Trans. p. 725, lines 7-11) reflect that on October 21, 1965 there was due to United the sum of \$772, 151.31 and that United bid in the property for \$725,000.00 leaving a deficiency of \$47,151.59.

We submit that the above is substantial evidence in support of the Referee's order that United was entitled to the insurance draft. Accordingly, United is entitled to an affirmance of the fifth appeal.

V

THE STATUS OF JOSEPH DUNNIGAN JR. AS STATE COURT RECEIVER.

At several places in its brief appellant criticizes the motives, ethics and tactics of United in this proceeding in connection with the appointment of Joseph Dunnigan, Jr. as State Court Receiver. For instance, appellant says (App.Br. p. 13, lines 12-24):



"Dunnigan was appointed state receiver without disclosing to the Court that he was the agent and representative of United in said loan transaction and interested in said action. He was disqualified as a matter of law to act as receiver. (CCP 566) This was not disclosed to the Court when it appointed Dunnigan receiver. Another Judge, Judge Alfred Gitelson, in a later hearing on October 30, 1964, on said matter raised by appellant who had appeared therein, requested Dunnigan to resign and he did in open Court. Judge Gitelson stated that said recignation was accepted 'effective upon the appointment by the Court of his successor.' There has been no successor appointed by the Court."

And again:

". . . United's action in the Superior Court, its fraud in obtaining the appointment of its agent Dunnigan as the receiver . . ." (App.Br. p. 91, lines 19-21).

This type of argument is difficult to answer because it is outside the record in this case. It is simply the version of counsel for appellant as to what happened in certain proceedings before a judge in the Superior Court. The fact of the matter is

that there are final orders in that State Court proceeding that represent the ultimate decision of Judge Gitelson on the points raised by appellant and those findings are directly contrary to appellant's claim that Dunnigan was disqualified from acting as receiver and that United committed a fraud on the Court in having him appointed. We feel these statements should be answered, so we will state what the substance of Judge Gitelson's order was, and offer, if this Court feels that the matter is of sufficient importance, to secure a certified copy of the findings of fact and conclusions of law, hereafter referred to, so that the record may be augmented. In action #844407, in the Superior Court of Los Angeles County entitled United Insurance Company of America v. The Calland Corporation, et al., Joseph Dunnigan, Jr., on November 29, 1965, filed his second and final account and report as receiver and petition for distribution and discharge. On December 6, 1965, Calland, through its present counsel, filed extensive objections alleging among other things that Joseph Dunnigan, Jr. was disqualified to act as receiver and that the appointment of Joseph Dunnigan, Jr. as receiver was fraudulently obtained; all on the ground that he was allegedly an agent of United. In findings of fact and conclusions of law, dated January 5, 1966, dictated and signed by Judge Gitelson and filed in that action, Judge Gitelson specifically found that the allegations in the objections filed by Calland that Joseph Dunnigan was disqualified

and that his appointment was obtained by fraud were untrue and in the conclusions of law concluded specifically as follows (p. 5, lines 11-12):

"IV

"That Joseph Dunnigan, Jr. was not disqualified to act as receiver herein."

and at (p. 5, lines 18 and 10):

"VII

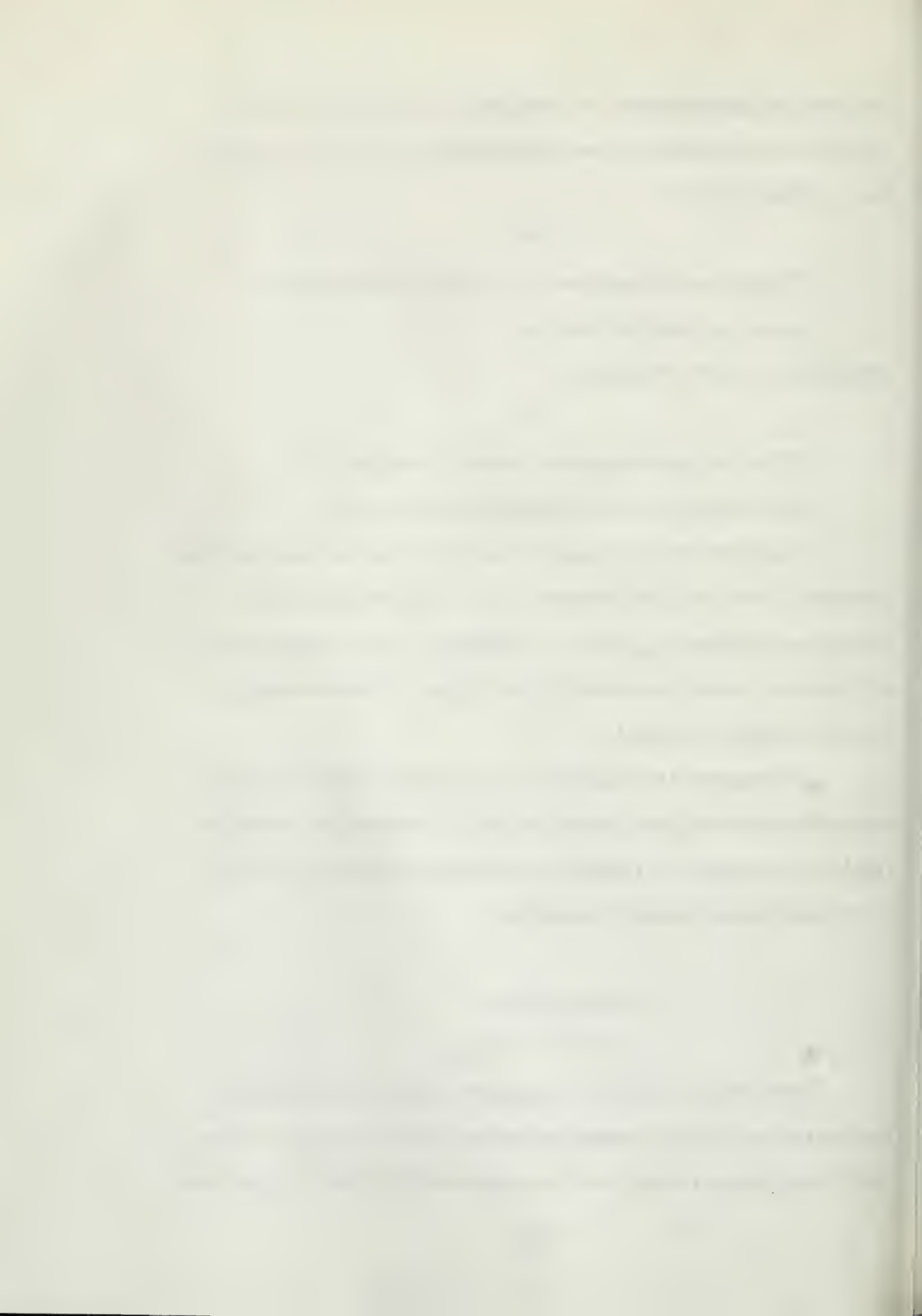
"That the appointment of Joseph Dunnigan, Jr. as receiver was not fraudulently obtained."

Appellant took an appeal from the order entered on these findings of fact and conclusions of law, but the same was dismissed October 25, 1966 by Division 1 of the District Court of Appeals, Second Appellate District, for failure to comply with the Rules on Appeal.

We suggest that appellant's good faith in making these serious charges against United is very questionable, when the final order entered in those proceedings is directly contrary to the statements made by appellant.

CONCLUSION

This was a routine foreclosure of a Trust Deed after the operation of the property had turned into a shambles. The only thing unusual about it is the extraordinary delaying tactics



of counsel for appellant. Although it appeared to us that appellant and its counsel were accorded every consideration at every stage, the entire proceeding was surcharged with accusations by counsel for appellant of misfeasance and/or malfeasance and/or overreaching and/or bad faith and/or fraud and/or bias and prejudice. Everyone from the Referee, to all counsel, and all adverse witnesses, came in for their share for this abuse. Even United States District Judge Irving Hill was presented with an affidavit of bias and prejudiced totally unjustified and subject only to the interpretation that it was an attempt to delay the proceedings (Trans. p. 396). Counsel for appellant's fifteen requests for extensions of time to file his opening brief is certainly some sort of record.

We suggest that either due to bad management, or bad advice, appellant found itself in a financial predicament from which it was unable to extricate itself and lost its property by foreclosure after having been given every opportunity to sell or refinance the property. We suggest that not only are the first and fifth appeals moot, but that appellant has totally failed to point out in any respect whatever where error occurred. We ask that the judgments appealed from be affirmed.

Respectfully submitted,

EUGENE KELLY

Attorney for Appellee
United Insurance Company of
America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eugene Kelly

EUGENE KELLY



JUN 18 1968

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA,

WILLIAM N. BOWIE, JR.,

Appellees.

APPELLEE'S BRIEF.

(William N. Bowie, Jr.)

FILED

SULMEYER AND KUPETZ,

JUN 18 1968

408 South Spring Street,
Los Angeles, Calif. 90013.

WM. B. LUCK, CLERK

*Attorneys for Appellee, William
N. Bowie, Jr., Trustee.*

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Bankruptcy during the course of the Chapter XI proceedings and the subsequent adjudication of bankruptcy, all of which Orders were affirmed on review by the United States District Court for the Central District of California. Each of the Orders appealed from will be dealt with separately hereafter and referred to numerically in accordance with those designations set forth in the Appellant's Brief.

II.

RE: SECOND APPEAL.

Statement of Case.

The Trustee, William N. Bowie, Jr., while acting as Receiver during the course of the Chapter XI proceedings, operated the principal asset of the debtor corporation consisting of a large apartment complex. The Receiver's appointment and authorization to operate the building was in accordance with the Order of the Referee in Bankruptcy. The Receiver filed a petition before the Referee, upon notice to the Debtor and other parties in interest, requesting authorization to reduce the rent schedule of the apartment complex, established by the Debtor before these proceedings commenced, so that the same would be more competitive with other apartment complexes in the surrounding area. There existed at the time a very large vacancy factor in said complex. At the hearing, the Receiver testified that in his judgment in order for the rents to be competitive with those charged by other apartment houses in the surrounding area it would be necessary to reduce the same. There was no contrary evidence presented, and the Referee determined that the decision was a business decision to be made by the

Receiver in his discretion, and entered an Order authorizing the Receiver to exercise this discretion, provided that he did not reduce the rents more than \$10.00 per apartment unit per month. The Debtor petitioned the District Court to review said Order. Thereafter, the Receiver moved the United States District Court to dismiss said Petition for Review (Referee's Order of July 6, 1965) on the ground that the Order had become moot. The supporting affidavit pointed out that the apartment house had been foreclosed upon; that possession thereof had been taken over by United Insurance Company of America; that the Receiver was no longer collecting any of the rents issuing from the premises. These facts were not disputed. The District Court by its Order dated November 12, 1965 and entered November 16, 1965, dismissed the appeal as being moot.

AUTHORITIES AND ARGUMENT.

An Issue Becomes Moot and Therefore No Longer Justiciable Where as a Result of Intervening Circumstances There Are No Longer Adverse Parties With Sufficient Legal Interest to Maintain the Litigation.

Thus where the Receiver in this matter no longer operated the property the issue as to whether he should reduce or not reduce rents resulting from the property was mooted.

Otis v. International Mercantile Co. (CCA 9th, 1938), 95 F. 2d 539;

Brainard v. Kovacevich (CCA 9th 1940), 111 F. 2d 714;

Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, (CCA 7th 1938), 97 F. 2d 223.

III.

RE: THIRD APPEAL.

Statement of Case.

As heretofore indicated, the Receiver took over possession of the apartment complex owned by the Debtor known as the "Kon Tiki Apartments" shortly after his appointment as Receiver on November 10, 1964. After the District Court affirmed the Referee's Order authorizing the first trust deed holder to complete its sale under the terms of its deed of trust, said sale was set and did, in fact, take place on October 21, 1965. The purchaser was United Insurance Company Of America. On October 22, 1965, the day following the sale, United Insurance Company of America by self help, did go into possession of the premises in question and did immediately notify all tenants and all parties to these proceedings in writing thereof. The Receiver made no effort to resist United Insurance Company Of America, but also took no steps to assist them. The Debtor, through its counsel, notified the Receiver and his counsel that the Debtor "does not recognize the validity of said sale and will hold all persons responsible for any violation of its rights whether referred to in Mr. Kelley's said letters or otherwise." Upon the receipt of the foregoing communication from the Debtor, counsel for the Receiver immediately prepared and filed an Application for an Order directing the Debtor and other junior trust deed holders to show cause why the Receiver should not relinquish possession of the premises to United Insurance Company Of America and further prayed that should the Receiver be directed to remain in possession that the Debtor or such other designated party file with the Court suf-

ficient bond to indemnify the Receiver against any damage or other liability to which he may be exposed. Upon notice to all parties, the Referee heard the application at which time he announced that he deemed the Receiver's Application to be in the nature of a request for instructions. At said hearing, the Receiver appeared; United Insurance Company Of America appeared, and the Debtor, though it filed a responsive pleading, did not appear. The Court heard the testimony and other evidence presented and made its Order entered on November 18, 1965. *The Debtor at no time during the course of any of the hearings or in any of the pleadings relative to the foregoing Order cited any case authority in support of its position.*

AUTHORITIES AND ARGUMENT.

The Debtor now contends that the Referee's Order was improper in that he was deciding a moot question. This position completely disregards the fact that the Debtor at the time had advised the Receiver (1) that it did not recognize the validity of the Trustee's sale, and (2) would hold all persons, including the Receiver, responsible for any violation of its rights resulting therefrom.

The Receiver was woefully cognizant of the generally accepted principle of California law that provides: "A Receiver who wrongfully takes possession of property of a third person or withholds possession from such third person without authority may be liable as a trespasser." *Fidelity Savings & Loan Assoc. v. Citizens Trus & Savings Bank*, 200 Pac. 631, 186 Cal. 689.

The Referee and the District Judge found and concluded that United Insurance Company of America

was entitled to possession of the premises. Said finding and conclusion is supported by substantial evidence and should be binding upon this Court.

General Order In Bankruptcy 47:

“Unless otherwise directed in the order of reference, the report of a Referee or of a Special Master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous. . . .”

The Eighth Circuit Court of Appeals in *Teasdale v. Prosperity Co.*, 290 F. 2d 328 (1961) stated:

“It is a settled rule of this and other courts that the findings of fact by a Referee in Bankruptcy if supported by substantial evidence, are not clearly erroneous; and if approved and confirmed and adopted by the District Court, they will not be disturbed on appeal.”

IV.

RE: FOURTH APPEAL.

Statement of Case.

Unfortunately, during the course of these proceedings counsel for the appellant, A. V. Falcone, devoted much of his effort in making personal attacks upon various participants in these proceedings. The initial recipient of these attacks was Hubert F. Laugharn, one of the attorneys for the Debtor at the time of the filing of these proceedings. Thereafter, he was substituted out of the proceedings. A personal attack upon the good faith and competence of Eugene Kelly, attorney for United Insurance Company Of America, was made by A. V. Falcone. A similar attack was at least impliedly

made against Norman W. Neukom, the Referee. When the Debtor was denied an *ex parte* request for continuance A. V. Falcone filed an Affidavit Of Bias And Prejudice against the United States District Judge, Irving Hill. (As a matter of law the same was found to be insufficient.) With this brief background as to the nature of the personalities involved in these proceedings it was not surprising that the Debtor, through its counsel, filed its motion for an Order to remove the Receiver, the Receiver's attorney, and the Receiver's employee, Bernard Crimm. A hearing was conducted on said motion on November 23, 1965. The only evidence presented was the testimony of William N. Bowie, Jr., the Receiver, and a transcript of previous testimony of Mr. Bowie taken on June 21, 1965. Upon the conclusion of the hearing, the attorney for the Debtor announced: "I will have no further questions and I will submit the motion." [Rep. Tr. November 23, 1965, p. 47, lines 21 and 22]. The Referee announced from the Bench that the Debtor's motion was denied. On December 2, 1965, the Debtor filed a "Notice of Motion to Vacate The Referee's Ruling And To Rehear The Matter And To Be Allowed To Introduce Further Evidence." The hearing on this motion to reopen was held on December 13, 1965 and said motion was denied. It was from the Order denying both of the aforementioned motions that the Debtor sought review of the District Court. It is from the Order of the District Court affirming the Referee that this appeal lies. Appellant's brief contains numerous misstatements of fact that are completely unsupported by the record. On page 52 of the brief, a statement underlined by counsel for the appellant stated; "that he (Receiver)

failed and refused to pay real property taxes on the property, accumulating money for the admitted purpose of creating a fund for his Receiver's compensation and fees of his attorney; . . ." It is true that the Receiver, upon the advice of his counsel, refused to pay any real property taxes. This Court should bear in mind that the Referee, after extensive hearings, had determined that there was no equity in the property over and above that which was owed to valid lien creditors upon the subject property. Section 64a(4) of the Bankruptcy Act (11 U.S.C. §104) relating to payment of tax claims provided in part as follows:

"Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: . . ."

The balance of the accusation referred to above is untrue and completely unsupported by any evidence.

AUTHORITIES AND ARGUMENT.

The Debtor Has No Standing to Move for the Removal of the Receiver, His Attorney or His Employees.

Section 2a(17) of the Bankruptcy Act (11 U.S.C. §11) provides as follows:

"Courts of bankruptcy may: (17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and upon *complaints of creditors* or upon their own motion remove for cause receivers or trustees upon *hearing after notice.*" (Emphasis added).

**An Appellate Court Will Not Consider Contentions
Relating to Rights of Parties Not Parties to
the Appeal.**

City of Long Beach v. Metcalf (CCA 9th
1939), 103 F. 2d 483.

**The Referee's Finding in Effect That No Cause Was
Shown for the Removal of the Receiver, His
Attorney or His Employee Is a Factual Deter-
mination Which Is Not Clearly Erroneous but
Has Been Accepted by the District Court and
Should Be Accepted by This Court.**

General Order in Bankruptcy 47;

In re Harris (9th CCA), 78 F. 2d 849;

Jue v. Bass (9th CCA), 299 F. 2d 374;

Cedar v. Bumb (9th CCA), 344 F. 2d 256.

**Moot Questions Will Not Be Considered by the
Appellate Court.**

All of the issues have in fact become moot in that the Receiver has been superseded by a Trustee in Bankruptcy and no longer has any employees, and is no longer conducting any business.

Brainard v. Kovacevich, supra;

Otis v. International Mercantile Co., supra;

*Johnson-Kennedy Radio Corp. v. Chicago Bears
Football Club, supra.*

The Referee Did Not Abuse His Discretion by Denying the Debtor's Motion to Reopen and to Introduce Additional Evidence.

This Court facing the identical question presented in *California Airmotive Corporation v. Bass* (CCA 9th 1965), 354 F. 2d 453, stated:

"It is apparent that the litigants were, on two separate days, afforded full opportunity for the presentation of evidence. It is also clear that they presented all the evidence which they chose to present until after the Referee had expressed his opinion as to the main issue of dispute, the only issue upon which evidence had been offered during the hearing, and had directed the Trustee to prepare proposed findings, conclusions and order. Then, twenty-nine days later, as has been related, the Petition to Reopen the Proceedings was filed. It is important to litigants and the public alike that there be effective and expeditious disposition of disputes which reach the courts, and this consideration is remarkably important in matters of bankruptcy. As we have previously written, 'in the conduct of any judicial or quasi-judicial hearing, reasonable discretion must be vested in the officer who guides the course of the proceedings.' . . . We could not find an abuse of such discretion absent a strong showing of prejudice to the litigant making the charge of such abuse."

V.

RE: SIXTH APPEAL.

Statement of Case.

The Calland Corporation filed an Original Petition pursuant to the provisions of Chapter XI of the Bankruptcy Act on November 10, 1964. The Referee, in accordance with the duties imposed upon him, did on November 23, 1964, send notice to all creditors of the first meeting of creditors under Chapter XI of the Bankruptcy Act, which notice set forth that a hearing would be held on December 9, 1964 at 2:00 o'clock, P.M. Additionally, said notice provided information as to the time in which creditors had to file their respective claims. The hearing referred to above was conducted and from time to time all matters provided for in the notice were continued. One of said continued hearings was January 12, 1966, at which time the Court set February 11, 1966 as the time when the Debtor was to file its proposed Plan of Arrangement and further set a hearing on said Plan of Arrangement to be held on March 3, 1966. Upon the request of the Debtor, the time to file the Plan was again extended until March 7, 1966, and then again on an additional request to March 25, 1966. The Debtor filed its proposed Plan on March 25, 1966 and the Referee then sent notice to all creditors whose claims were filed in the proceedings as well as to creditors listed by the Debtor in its schedules, and such other parties interested therein. Said notice contained a printed reproduction of the Debtor's proposed Plan and provided

that the hearing for consideration of the confirmation of the proposed Plan was set for April 26, 1966 at 10:00 o'clock, A.M. The notice provided that the Court will consider at that time the confirmation of the Plan and, if the Plan is not confirmed, that the Court would consider whether the proceedings should be dismissed or whether the Debtor should be adjudged a bankrupt and bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act, and that at the time and place of said hearing, the Court would further consider all objections to the Plan, if any. Objections to the Plan were filed by United Insurance Company of America. At the time of the hearing, the Debtor appeared through his counsel, and the Court asked if the Debtor was ready to file its Application For Confirmation Of The Plan. The reply was in the negative. The Court asked the Debtor's counsel if he had any consents of general unsecured creditors to the proposed Plan. The Debtor's reply was again in the negative. The Debtor offered no evidence and the Referee, after reviewing the Plan itself together with the Debtor's failure to file an Application For Confirmation Of The Plan, its failure to file any consents to the proposed Plan, and his failure to tender any deposit necessary in order to confirm such a plan, did as a matter of fact arrive at the opinion that it was in the best interests of creditors that the Debtor be adjudicated a bankrupt and that bankruptcy be proceeded with as provided for in Section 376 of the Bankruptcy Act (11 U.S.C. §776). The Referee further found that the proposed Plan was not feasible. The objections to the Plan of Arrangement were not heard and therefore not determined as a result of those findings.

AUTHORITIES AND ARGUMENT.

That Debtor has cited no authorities, either to the Referee, the District Court, or this Court supporting its position. Section 366 of the Bankruptcy Act (11 U.S.C. §766) provides that the court shall confirm a plan of arrangement only if satisfied that:

- (1) The provisions of this Chapter have been complied with;
- (2) It is for the best interests of the creditor and is feasible;
- (3) The Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and
- (4) The proposal and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by this Act."

The burden to satisfy the Court as to the matters referred to in Section 366 is upon the Debtor.

In re Credit Service, Inc (D.C. Maryland),
31 F. Supp. 979;

In re Romec Pump Co. (N.D. Ohio E.D.),
31 F. Supp. 389.

In light of the fact that the Debtor failed to offer any evidence whatsoever to support the Plan proposed by it; it failed to make a deposit, as required by the Act; failed to file an Application For Confirmation, as required by Section 362 (11 U.S.C. §762); failed to file the necessary written consents of unsecured creditors to said Plan, as required by said Section, it

appears ludicrous for the Debtor to contend that the Referee abused his discretion in failing to confirm the same.

Upon the Referee's refusal to confirm the Plan of Arrangement he had basically two alternatives: Either to adjudicate the Debtor a bankrupt, or to dismiss the proceedings.

Section 376 of the Bankruptcy Act (11 U.S.C. §776).

The Editors of *Collier on Bankruptcy, 14th Edition, Vol. 9*, at page 494, point out:

"The interest of the Debtor does not determine the result. In the ordinary case, the interest of the creditors will require that the Court adjudge the Debtor a bankrupt and direct that bankruptcy be proceeded with pursuant to the Act."

VI.

RE: SEVENTH APPEAL.

Statement of Case.

The Debtor filed a motion for an Order directing the Trustee to appear and defend a certain action in the Superior Court. The noticed hearing was set for April 21, 1967. On said date, the Debtor did not appear and counsel for the Trustee requested that the matter be submitted. The Referee refused, however, and stated: "I deem it advisable that I have the benefit of oral argument in connection with this case despite the fact that counsel representing the respective parties have consented to the submission of the matter." The Referee then continued the matter until April 28, 1968 at 1:30 P.M. The attorney for the Debtor by

his letter of April 25, 1967 advised the Referee: "I will not be able to appear in your Court on the 28th instant in the above matter as you fixed in your letter of the 21st instant. I can appear on the afternoon of May 3rd and 4th, 1967." Counsel for Trustee then received a duplicate original letter from the Referee in Bankruptcy advising: "The hearing in the above matter now set for April 28, 1967 at 1:30 P.M. has been continued to May 3, 1967 at 1:30 P.M." The bankrupt did appear at said hearing; introduced no evidence, but referred to various statements made in support of his motion, and the matter was generally argued. At the conclusion thereof, the Referee announced his decision denying the motion and leaving any decision with regard to appearance in the state court action to the sole and exclusive determination of the Trustee and his counsel. The bankrupt thereupon waived any findings of fact and conclusions of law.

The Referee had previously heard an application filed by United Insurance Company Of America entitled; "Application For Order To Show Cause Re Permission To Include William N. Bowie, Jr., Trustee, As Defendant In Quiet Title Action". Hearing was held on said application, at which time the bankrupt was present through his counsel; the Trustee was present through his counsel, and United Insurance Company Of America was present through their counsel. The hearing presented principally two issues: (1) Whether the Trustee could be joined as a party defendant in the state court action for quiet title filed by United Insurance Company Of America, and (2) what action the Trustee should take in the event of such joinder. United Insurance Company Of America contended and urged that

the Trustee be required to file a disclaimer. The bankrupt urged that the Trustee file an answer and set up the fact of the numerous appeals now pending before the Ninth Circuit Court of Appeals as something in the nature of an abatement. The Referee in Bankruptcy, after fully considering the matter, issued his Order, dated December 22, 1966. Said Order provides in part as follows:

“FURTHER ORDERED, that the application requesting an Order requiring the Trustee when and as a summons and complaint in said quiet title action is served upon him to sign and file in said action a disclaimer of all rights, titles and interest therein be, and the same is, hereby denied without prejudice to the right in said Trustee to take whatever action in connection with said quiet title action he deems appropriate.”

Said Order was reviewed by the District Court and approved by its Order of February 28, 1967, which Order is now final. The Referee's Order of May 18, 1967 related to the motion of the Debtor requesting that the Trustee be required to appear and defend the quiet title action referred to in the application filed on November 23, 1966 by United Insurance Company Of America. The Referee, in both of his Orders, specifically refused to direct the Trustee as to what action he should take and left the matter to the Trustee's discretion.

ARGUMENT AND AUTHORITIES.

The Responsibility for Determining Whether or Not the Trustee Should Pursue or Defend Actions in Other Forums Is Upon the Trustee.

“Rights of action arising upon contracts or property of the bankrupt pass to the Trustee, and he is responsible for asserting them in the proper tribunal when necessary for collection and preservation of the estate. He is not required to burden the estate with costs and expenses of litigating a matter where there is no probable cause for believing a right of action exists. 6 *Collier, Bankruptcy*, pp. 1744, 1746. Nor does the fact that the Trustee worked under supervision of the Court confer on the Court authority to determine the merits of controversies between the Trustee and third parties which are in the jurisdiction of another forum. *Palmer v. Travellers Insur. Co.*, (CCA 5th 1963) 319 F.2d 296.”

Stutts v. Waldrop (CCA 5th 1967), 377 F. 2d 275.

It is respectfully submitted that for the Referee to determine whether or not the Trustee should intervene or defend a Superior Court action in effect would require a predetermination by the Bankruptcy Court of the merits of the controversies between the Trustee and third parties which are in the jurisdiction of another forum.

Conclusion.

The bankrupt in its numerous appeals included herein attacks the propriety of the Rules of the United States District Court for the Central District of California; in particular, Local Rule 218, as well as the conceptual objectives of Chapter XI as viewed by the Referee and the United States District Judge. In fact, Chapter XI is an arrangement proceedings whereby a Debtor is to propose a Plan for the settlement, satisfaction, composition or extension of his unsecured debts. The plan that provides for the straight liquidation and sale of all of the Debtor's property will not usually be entertained, for the same proposes nothing more than a liquidation, which is the purpose of a straight bankruptcy proceedings where creditors are given many protective features that are not necessarily available in a Chapter XI proceedings.

In re Pure Penn Petroleum Co., Inc. (CAA 2d 1951), 188 F. 2d 851.

Secured creditors cannot be dealt with in the sense that their claims may not be extended, modified or altered in Chapter XI proceedings. The Court does, however, have the jurisdiction to restrain enforcement of the liens pending the Chapter XI proceedings. This power, however, must be used only after serious consideration of the reasonableness of the restraint sought and the adequacy of the security of the lien creditor.

The proceedings filed by The Calland Corporation were similar to numerous other Chapter XI proceedings filed within the last five years; *i.e.*, where the debtor's principal occupation was the ownership and operation of an apartment house. The reason for the

filing of numerous similar cases directly results from the real estate depression experienced in Southern California coupled with the nonavailability of new financing to owners or prospective purchasers. The objective, therefore, generally sought was a delay, or postponement of a usually pending foreclosure in the hope that the real estate market would improve; that financing would become available resulting in the sale of the property and creditors paid. In the instant matter, however, the Debtor was able through various tactics to obtain approximately a two year delay of the actual foreclosure of the subject property. It was within this period of time that the Debtor was yet unable to generate new financing or a substantial buyer in order to create the illusory equity that it claimed existed in the subject property. It is respectfully submitted that it is the Debtor and his counsel who misconceived the objectives of a Chapter XI proceedings. It is further submitted that all of the appeals now pending before this Court, in light of the foreclosure of the real property and the adjudication of the Debtor as a bankrupt, have become moot and they should be dismissed.

Respectfully submitted,

SULMEYER AND KUPETZ,

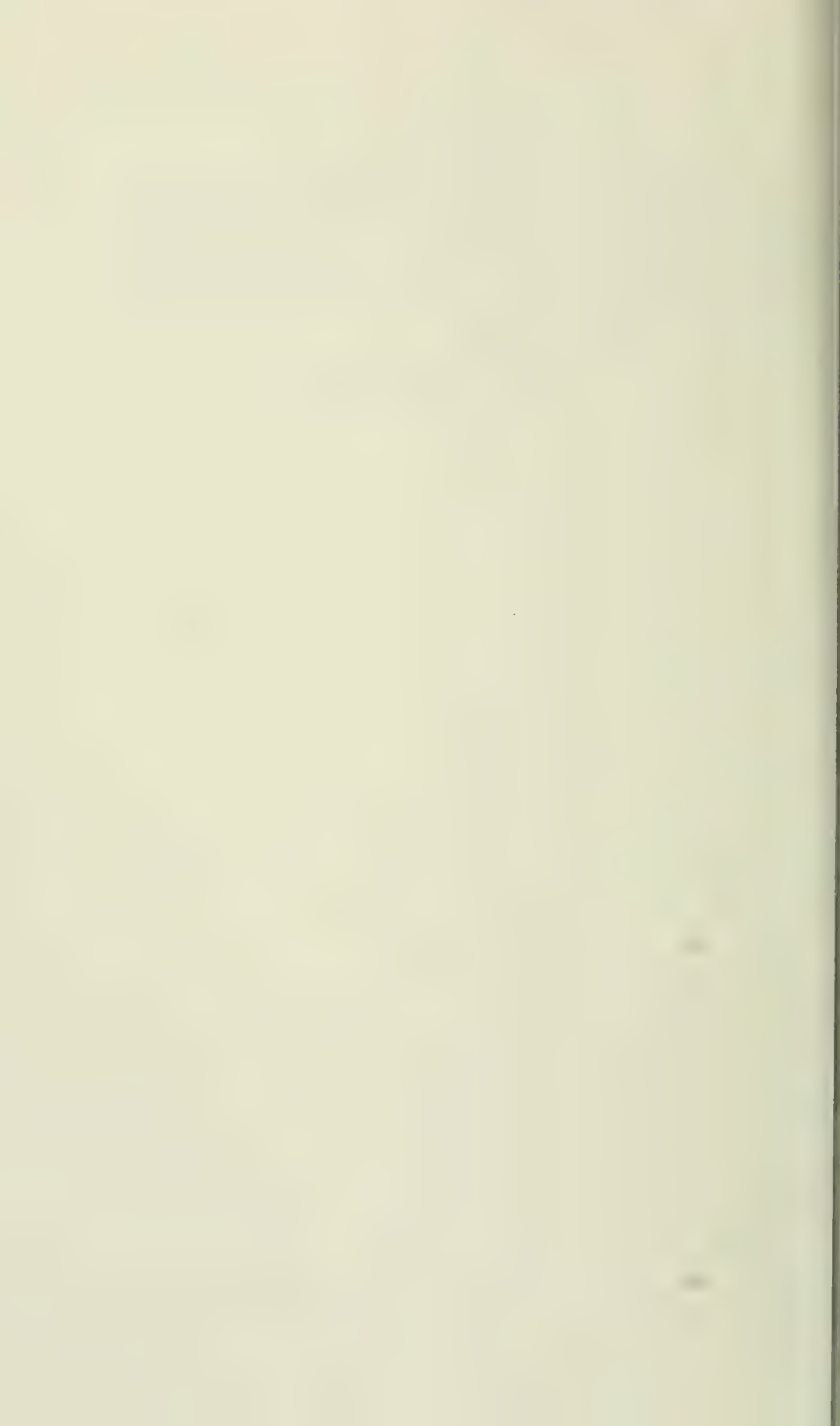
BY ARNOLD L. KUPETZ,

*Attorneys for Appellee, William
N. Bowie, Jr., Trustee.*

Certificate.

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARNOLD L. KUPETZ



IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RONALD JAMES LAWRENCE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,317

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

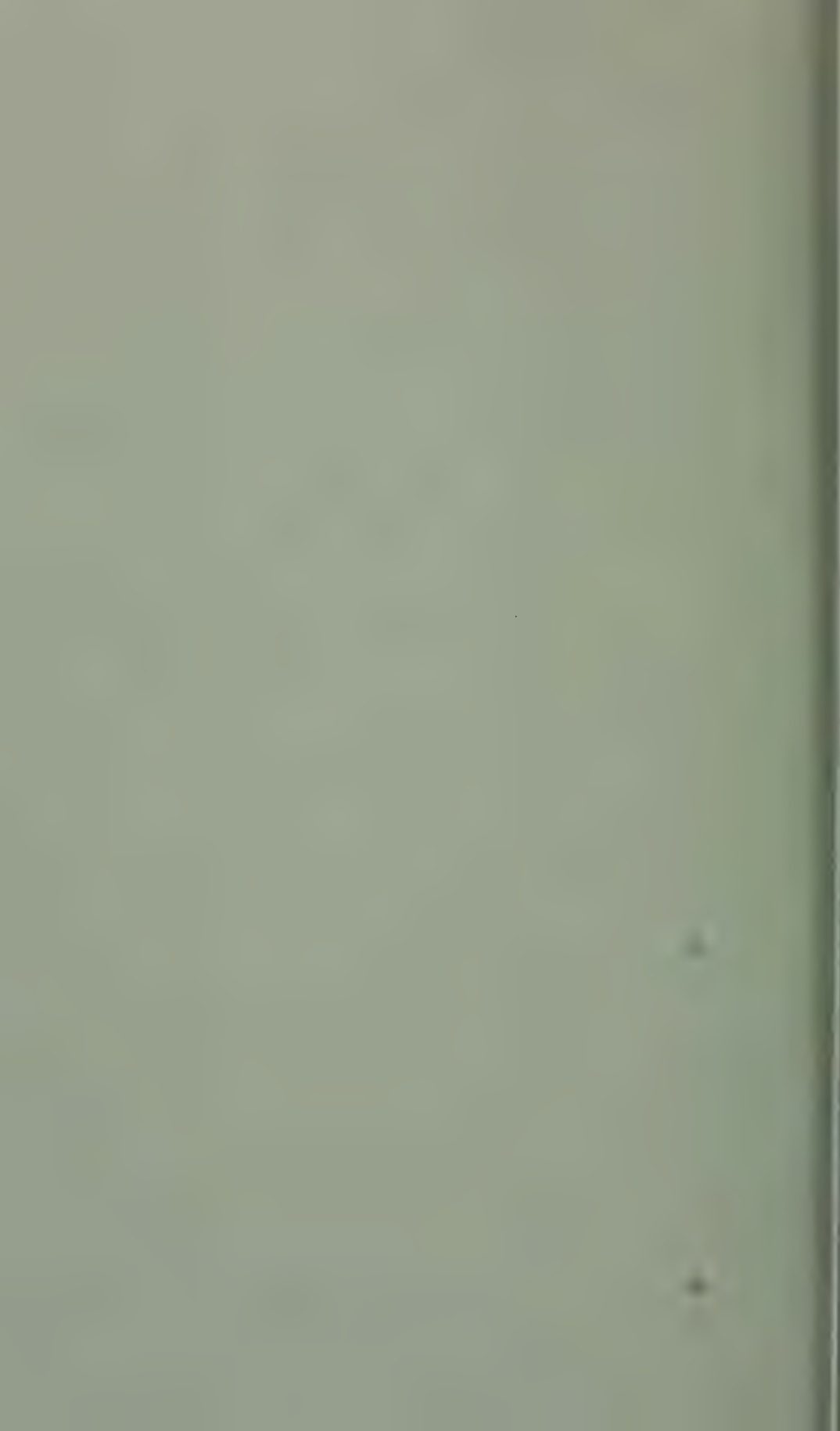
JO ANN D. DIAMOS
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FILED

APR 8 1968

WM. B. LUCK, CLERK





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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RONALD JAMES LAWRENCE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,317

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On May 24, 1967, the Appellant Ronald James Lawrence was advised by the Court of the nature of the charge pending against him and of his right to appointment of counsel if he could not afford counsel. The Court then appointed Richard J. Dowall (Clerk's transmittal of record of docket entries).

(Hereinafter the Clerk's record will be referred to as

"RC"; the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; the Appellant Ronald James Lawrence will be referred to as "Juvenile" or "Ronald Lawrence.")

Thereafter the Court explained to the Juvenile his rights, i.e., to Indictment by Grand Jury, and if Indictment is returned, to a trial by jury, but that he could waive those rights and consent to the United States Attorney proceeding against him as a juvenile. The Juvenile then executed a consent which was filed, and the U. S. Attorney then filed an information charging that the Juvenile had committed an act of juvenile delinquency in that he caused the transportation of a stolen motor vehicle in interstate commerce which he knows to be stolen, under the provisions of 18 U.S.C.A., §5031, et seq. Title 18 U.S.C.A. The Juvenile denied the act of juvenile delinquency and the matter was set for trial on July 7, 1967. (RC Docket entries)

On July 7, 1967, trial was held and the Court found the Juvenile did commit the act of juvenile delinquency and set July 21, 1967, as the date for entering judgment (RC Docket entries). On July 21, 1967, the Court adjudged the juvenile guilty of having committed an act of juvenile delinquency and sentenced the Juvenile to the custody of the Attorney General for his minority. The United States District Court has jurisdiction by virtue of the provisions in 18 U.S.C. 2231. This Court has jurisdiction of Appeal by virtue of 28 U.S.C. §1291 and §1294.

II.

STATEMENT OF FACTS

The Government accepts and hereby adopts the Appellant's Statement of Facts, with the addition which will be set out in the argument.

III.

SUMMARY OF ARGUMENT

1. The Appellant's constitutional rights were not denied him when admissions *not* made in response to custodial interrogation were admitted in evidence.

2. The Government had sustained the burden of proving all the acts of juvenile delinquency beyond a reasonable doubt.

IV.

ARGUMENT

1. The Appellant's constitutional rights were not denied him when admissions *not* made in response to custodial interrogation were admitted in evidence.

The Juvenile was placed under arrest by Arizona Highway Patrol Officer, Sgt. William Chewning, in the presence of Patrol Officer Matthews. Matthews testified that he heard Sgt. Chewning advise the Juvenile of the same constitutional rights that he, Matthews, had advised Larry Lawrence of (RT 21, L 7-10). (See what was said by Patrol Officer Matthews to Larry Lawrence, RT 19 L 23 to 20 L 11.)

However, Officer Matthews did not hear Sgt. Chewning have the Juvenile repeat those rights back to him as he had done with Larry Lawrence (RT 21, L 11-12). Special Agent G. Wayne Mack in taking the rest of the information that evening at the Sheriff's Office repeated his rights to him, individually (RT 43, L 1-5). The next morning he was taken before the Justice of the Peace in Safford and advised that the charge pending against him was the interstate transportation of a stolen motor vehicle, and again advised by the Justice of the Peace "that they had the right to remain silent, not make

any statement; anything they did say could be used against him in a court of law; that they had the right to have advice and council from a lawyer before making any statement and a lawyer could be appointed for them later by the Court.” (RT 36, L 5-10)

Special Agent G. Wayne Mack then took custody of the Juvenile to transport him to Globe, Arizona, to the nearest available United States Commissioner. While Special Agent Mack was driving the Juvenile, the following occurred:

“In the beginning, there was some comment made by the defendant boasting about the superiority of the Royal Canadian Mounted Police Officers in Canada as compared to the officers in the United States, and further he had an uncle who was with the Royal Canadian Mounted Police. And I said, ‘What do you base it on?’ And he says, ‘Well, we got stopped in four different States, and if the officers had been sharper they could have had us before, before we got stopped in Safford,’ and I said, ‘Where were you stopped in these four States?’ And he said, ‘I have said too much already, I’m not saying any more.’” (RT 44, L 8-18)

As was held in *Miranda v. Arizona* (1966) 384 U.S. 436 at page 479, 86 S.Ct. 1602, 16 L.Ed 2d 694, “But unless and until such willingness and waiver are demonstrated by the prosecution at trial, no evidence obtained *as a result of interrogation* can be used against him.” As the Trial Court stated:

“THE COURT: Well, apparently we have wasted an awful lot of time on foundation and now it appears that it was not even the product of conversation but it was something that the witness volunteered to the officer, and I don’t think that we have reached the point that, if a witness insists on telling an officer something, that it can’t be used. It’s only when the defendant is under custody and has attention focused on him. This appears to be something said voluntarily. The Motion to Strike is denied.” (RT 47, L 6-14)

It is respectfully submitted that the statement made by the Juvenile was voluntarily made and was not made in answer to any question by the F.B.I. agent.

2. The Government had sustained the burden of proving all the acts of juvenile delinquency beyond a reasonable doubt.

Appellant's Opening Brief asserts that no evidence, either direct or circumstantial, was offered as to knowledge of the Juvenile that the car was stolen and that he in any way was associated with the interstate transportation of the vehicle. As the Trial Court found:

"THE COURT: The Court finds that the vehicle, 1963 Pontiac convertible, which has been testified about in this case was owned, in May, 1967, by David John Speck, that on the 11th of May, 1967, Mr. Speck had the vehicle at his home in Ontario, Canada; that the vehicle was taken from Mr. Speck's premises without his right or permission; that it was taken with intent to deprive him of his rights and benefits of ownership; that it was transported from Ontario into Arizona; that accordingly it was a stolen vehicle and it had been transported in inter-state commerce. And the Court finds further that the defendant Ronald James Lawrence was a participant in the transportation of the vehicle with his brother and the other passenger of the car; that as such participant, and that he knew the vehicle to have been stolen when it was transported from Canada into the United States and ultimately into Arizona. The Court concludes accordingly that the juvenile did commit the act of juvenile delinquency charged in the Information in this case, and I'm going to have a pre-sentence investigation made in the case." (RT 56, L 14 to RT 57, L 7)

The evidence received at trial showed that the Juvenile was arrested with his brother, Larry Lawrence, driving and a passenger by the name of James Edward Friesman. All three

were from Canada. The vehicle was stolen from David John Speck in Canada. The statement by the Juvenile that they could have been stopped in four states is grounds for the Court's finding that he, the Juvenile, caused the interstate transportation, i.e., he associated himself with the joint venture, i.e., there was a concert of action. *Fuentes v. United States* (9th Cir., 1960) 283 F.2d 537 at 539. The evidence on appeal must be construed in the light most favorable to the Government. *Enriquez v. United States* (9th Cir., 1964) 338 F.2d 165.

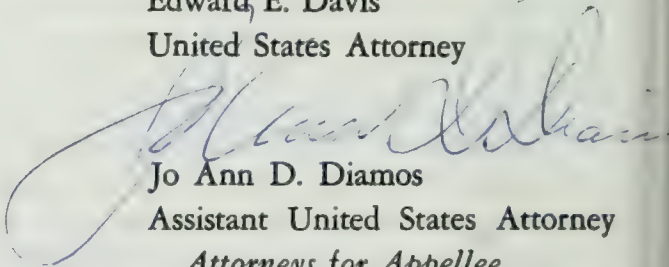
V.

CONCLUSION

It is respectfully submitted that the statement made by the Juvenile was voluntarily made and there was sufficient evidence upon which to find that the Juvenile had committed an act of juvenile delinquency.

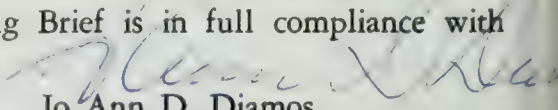
Respectfully submitted,

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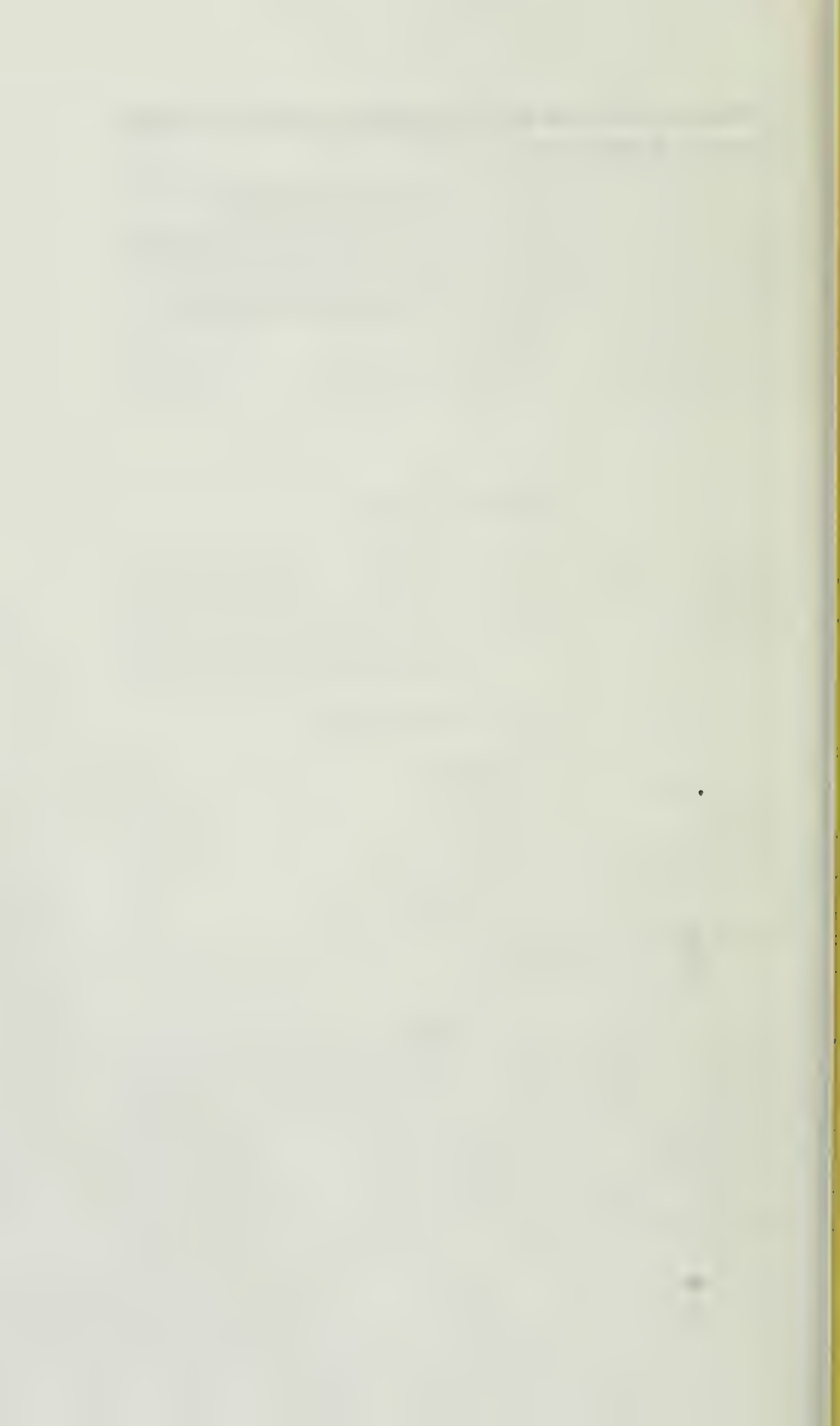
I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Damos
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Three copies of the Brief of Appellee mailed this 5th
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United States Court of Appeals
FOR THE NINTH CIRCUIT

ELIZABETH ELAINE CRAIG,
Administratrix of the Estate
of ROBERT J. CRAIG, deceased,

Appellant,

vs.

THE UNITED STATES OF AMERICA, et al. ,

Respondent.

FILED

MAR 25 1968

WM. B. LUCK, CLERK

On Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS
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Respondent.

APPELLANT'S OPENING BRIEF

JURISDICTION OF THIS COURT

This is an appeal from an order of the District Court entered in an admiralty case, denying permission to amend a libel for wrongful death under the Death on the High Seas Act set forth in Title 46 of the U. S. C. A. Sections 761 through 768. Said statute provides that whenever the death of a person shall be caused by the wrongful act of another on the high seas, beyond a marine league from shore, the District Court of the United States in admiralty shall have jurisdiction of any suit. (See 1. Tr. , p. 2, ll. 26 through 32; p. 3, ll. 1 through 4; p. 4, ll. 20 through 32; and p. 5, ll. 1 through 24.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction to entertain this Appeal pursuant to Title 28 U. S. C. A. Section 1291, establishing

jurisdiction in the Court of Appeals from final decisions of the District Court of the United States, and Title 28 U.S.C.A. Section 1292(3), providing that the Court of Appeals has jurisdiction in appeals from interlocutory decrees of District Courts determining the rights and liabilities of the parties to admiralty cases, in which appeals from final decrees are allowed. Insofar as the respondent, LITTON SYSTEMS, INC. sued and served herein as DOE I, and appellant are concerned, the order finally determines the rights of appellant and respondent. (See Cl. Tr., pp. 91, 92, and 93, with the entry of the order being made in the Civil Docket of the United States District Court set forth in the Cl. Tr., p. 29 under date of June 2, 1967.)

STATEMENT OF THE CASE

This appeal involves the determination of the propriety of the filing of a suit in admiralty under the Death on the High Seas Act against known individually named defendants, together with an allegation as to ten (10) unknown fictitiously named defendants. The libel sets forth a cause of action against the named known defendants and fictitiously named defendants stating in substance that the plaintiff does not know who they are, but believes that they are in some manner responsible for the death in question and further specifically alleges that the fictitiously named defendants were careless and negligent in the construction, designing, engineering, fabricating, manufacturing, equipping, supplying and maintenance of the arresting gear assembly on board a vessel owned and operated by United States of America, more commonly known as the aircraft carrier CONSTELLATION. The libel was served on the United States of America, TIMKIN ROLLERBEARING COMPANY;

ALUMINUM COMPANY OF AMERICA; and BETHLEHEM STEEL CORPORATION.

Preliminary motions have been made by the United States of America and Timkin Rollerbearing Company, which are not involved in the question presented on this appeal.

After the running of the Statute of Limitations under the Death on the High Seas Act, (August 19, 1965), plaintiff served an Alias Citation on the respondent, LITTON SYSTEMS, INC, as DOE I. Subsequently exceptions to the libel were filed and a motion was made by appellant to amend the libel to bring in the respondent, LITTON SYSTEMS, INC. as DOE I. The District Court acceded to the use of fictitiously named defendants, but refused to allow the amendment to bring in LITTON SYSTEMS, INC. as DOE I after the running of a Statute of Limitations, and by such order has precluded the maintenance of any action against LITTON SYSTEMS, INC. in any manner by appellant.

QUESTION ON APPEAL

The question involved is: Whether or not, once an action is maintained against fictitiously named defendants, must they be served prior to the expiration of any period of limitations; And, if they are not so served, does Rule 15c of the Federal Rules of Civil Procedure prevent them from being brought in unless they have actual notice of the action as distinguished from knowledge of the circumstances.

The proposition involved concerning fictitiously named defendants and amendments to pleadings is raised by means of an appeal from the order terminating the litigation between the appellant and the respondent, LITTON SYSTEMS, INC. Since the order is a final adjudication of appellant's claim against this respondent,

and prevents her from any judgment in the case, a review of the propriety of the order after a determination of the litigation involving the co-defendants would work an injustice on appellant and it would be fruitless to prove or attempt to prove her case against LITTON SYSTEMS, INC. She therefore must have a determination as to whether or not this particular defendant, LITTON SYSTEMS, INC. can be in the case. In addition thereto, further discovery could conceivably bring up additional parties involved in the manufacture of the arresting gear mechanism, who may be responsible for the accident in question; and, under the present state of the record, appellant would be forever precluded from bringing in additional defendants by the fictitious naming and appropriate amendments to the libel.

ARGUMENT

A. Jurisdiction for review, under 28 U.S.C.A. Section 1291

As pointed out above, jurisdiction of this Court is based upon Title 28 U.S.C.A. Sections 1291 and 1292(3). The pertinent portion of Section 1291 is set forth as follows:

"the Courts of Appeals shall have jurisdiction of Appeals
from all final decisions of the District Courts of The United
States, . . ."

Where there has been an order made which was intended to terminate the litigation in the District Court, then such an order becomes an appealable order under the above quoted statute. See Peterson Steels vs. Seidmon (1951) 188 F.2d 193. In the present case, the order refusing plaintiff the right to amend her libel and insert the name of LITTON SYSTEMS, INC. in place of DOE I, effectively

precludes a merging of the Court's order into a final judgment that may be entered between the plaintiff below and the co-defendants since it is not a party. Since we are in the pleading stage, it is apparent from the complaint that plaintiff is suing for the wrongful death of her husband and the father of the minor children which occurred on the 19th of August, 1963, while he was landing his airplane on board the CONSTELLATION. The conduct proximately resulting in the death of decedent was the negligence of the manufacturers of the vessel and more particularly those individuals who may have manufactured the arresting gear mechanism. (Cl. Tr., p. 5, ll. 4-18.) It is important to point out that in addition to the named defendants, appellant sought recovery against unknown defendants listed as DOES I through X. Appellant is in doubt as to which of the defendants is responsible and thereby joined them all seeking to prove which one or ones were responsible at the time of trial. (See Cl. Tr., p. 5, ll. 20-24.) It goes without saying that the heirs at law of the decedent, namely his wife and children, at the time of the filing of this action, did not know and could not possibly have known of all of the component parts manufacturers, who may have been involved in making the arresting gear assembly installed on a first line fighting ship of the UNITED STATES NAVY. The heirs have filed, within the statutory period, an action against known and unknown parties and will require additional proof as to which one or ones may or may not be responsible.

A portion of this responsibility or nonresponsibility has already been decided by the District Court, insofar as the United States Government is concerned, where- in an order to dismiss the United States Government was granted and entered on December 29, 1965. (Cl. Tr., p. 28.) The defendant, TIMKIN ROLLERBEARING,

was granted a dismissal on the merits on December 9, 1966. (Cl. Tr., p. 29.)

If appellant tries her case and is unsuccessful in proving a claim against the balance of the named defendants who have been served, the final judgment in the case will preclude the determination of the question involved in the present appeal, namely, whether or not fictitiously named defendants may be brought into the case after the running of the Statute of Limitations so long as cause of action has been stated against them. It is submitted that any final judgment between appellant and any of the remaining defendants can have absolutely no effect upon the order involved in the instant appeal, which completely precludes the maintaining of any action of any kind at any time against LITTON SYSTEMS, INC. For these reasons the order is a final determination under the statute set forth above.

There is authority for the proposition that where it would be impractical or futile to continue the litigation when an order terminating it as to certain parties has been made may be reviewed on appeal. See Eisen vs. Carlisle (1966) 370 F.2d 119. In the event that LITTON SYSTEMS, INC. cannot be brought into this litigation, appellant may be in a position where she cannot seek redress against the party who manufactured the component parts of the arresting gear assembly. In companion litigation arising out of the occurrence in question, MC KIERNAN-TERRY CORP., one of the named defendants in the case at bench, has been declared non-existent and for all intents and purposes a party who can no longer be served with process (Cl. Tr., pp. 42, 45). The exact status of LITTON SYSTEMS, INC. and its relationship to MC KIERNAN-TERRY CORP. is a question that is not fully answered and is open to some proof as to whether or not LITTON SYSTEMS,

NC. now owns MC KIERNAN-TERRY CORP. Counsel for the respondent, LITTON SYSTEMS, INC., at the oral argument on the motion in question was not prepared to admit that LITTON SYSTEMS, INC. was the successor in interest to MC KIERNAN-TERRY CORP. as evidenced by the remarks set forth in the Reporter's Transcript on page 33, lines 16-25 and page 34, lines 1-14. In the present posture of this case, if this Court refuses to hear this appeal, and decide the question involved, appellant may well be forced to try her case, prove that MC KIERNAN-TERRY CORP. manufactured the component parts and since it is a defunct corporation, she is completely prevented from maintaining her action against any successor in interest and more particularly against LITTON SYSTEMS, INC. because they have never been in this case and appellant cannot now institute a separate action against LITTON SYSTEMS, INC. under the Death on the High Seas Act.

For the foregoing reasons, it is urged that under the collateral order doctrine set forth in 6 Moore's Federal Practice, paragraph 54.31 at page 235, this order and its determination on appeal should not be deferred until a final determination among the remaining defendants since it can't be reviewed at that time and appellant would be trying a case from an impractical standpoint. This is especially so if the ultimate proof is that the only manufacturer of the parts involved was MC KIERNAN-TERRY CORP., a non-entity.

B. Jurisdiction for review under 28 U.S.C.A. 1292 (3).

For the same reasons set forth above, it is submitted that jurisdiction lies in this Court under Title 28 U.S.C.A. Section 1292 (3) which states as follows:

"The Courts of Appeals shall have jurisdiction of appeals from . . . (3) Interlocutory decrees of such District Courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; . . ."

The denial of a motion to amend a libel after the Statute of Limitations has run effectively terminates the libel and is an appealable order under the above statute. See A. H. Bull Steamship Co., et al. vs. United States (1946) 235 F.2d 1, 2. The collateral order doctrine also applies to such orders so long as they determine the rights and liabilities of the parties. See In Re Wills Lines, Inc. (1955) 227 F.2d 509, where the Court at page 510 cites Cohen vs. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 and quotes the following:

"In that case it was held that appeals would lie from certain orders which, which technically interlocutory, 'finally determine claims of right separable from and collateral to rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. '"

If appellant is going to be prevented on future discovery from bringing in unknown parties, who may have had a hand in the manufacture of the arresting gear assembly, she should know it now, rather than going to the expense of locating and tracking down the multitude of assemblers and sub-assemblers that obviously were involved in the manufacture of the component parts of this vessel. Assume for the sake of argument that a Swedish Corporation manufactured the sheave that exploded

in the arresting gear engine. As of now, since the Swedish Corporation is not named in the libel, they could successfully come in and defeat the attempted service of a citation upon them as a fictitiously named defendant setting up the very reasons that the Court acceded to so far as LITTON SYSTEMS, INC. is concerned. A final determination in this case between the parties that are left before the Court would have no effect on any possible parties who are not defendants and there would be no merger of the orders denying the amendment into the final judgment. Appellant is not willing nor should she have to wait and run the risk of being wrong.

Question involved on the appeal.

I. Use of fictitiously named defendants.

There is no Admiralty Rule nor Rule of Civil Procedure that specifically permits the use of fictitiously named defendants in a case where jurisdiction is not predicated upon diversity of citizenship, nor are there any rules that prohibit such practice.

The only case in the United States on the admiralty side, which allows the use of fictitiously named defendants, is Phillips vs. The United States (1955) 127 F. Supp. 912, where the United States District Court for the Northern District of California, Southern District speaking through Oliver J. Carter, Judge, says at page 914:

"Respondent moves to dismiss the first amended libel on the grounds that the use of 'Doe parties' in admiralty suits is improper and objectionable . . . But there is ample authority for the proposition that admiralty practice is particularly liberal, especially as to the allowance of amendments. (citations).

The general rule is described in 2 Benedict on Admiralty 557,

as follows:

'It has always been the practice in the American admiralty courts to allow every facility to the parties to place fully before the court their whole case and to enable the court to administer substantial justice between the parties . . . Therefore, on proper cause shown, omissions and deficiencies in pleadings may be supplied and errors and mistakes in practice, in matters of substance as well as of form, may be corrected at any stage of the proceedings for the furtherance of justice. '

Furthermore there is a large element of judicial discretion in the matter of allowing amendments, as shown by the following statement from the opinion in Jacobs vs. Pennsylvania R. Co., D.C. Del., 31 F. Supp. 595, 596:

'Whether amendments are to be allowed or refused is almost wholly within the discretion of the Court. Modern authorities favor allowing amendments to prevent failure of justice, especially where the statute of limitations has run. '

And in 2 Benedict on Admiralty 559-560, with reference to the exercise of judicial discretion in the allowance of amendments:

'The whole subject rests entirely in the discretion of the court, as well in relation to the relief to be granted, as to the terms on which it shall be granted, but the court is inclined to invite amendments if at any time a proctor discovers that

his pleadings are incorrectly drawn. '

In view of the extreme liberality of procedure in admiralty, no objection is seen to the designation of unknown parties by fictitious names. The practice of pleading Doe parties is in common use in many states and has a beneficial use in cases involving a situation similar to the case at bar. If the practice of using Doe parties is not approved by this Court, libellant will be prevented from having his day in court.

It is immaterial that there is no precedent for the procedure followed herein: The power of the district courts to permit new practices in admiralty cases in order to deal adequately with new situations stems from Supreme Court Admiralty Rule 44:

'Rule 44. Right of trial courts to make rules of practice.

'In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.'

28 U. S. C. A. Admiralty Rules.

A leading case construing Rule 44 is The Cleona, D. C. S. D. N. Y. , 37 F. 2d 599, 600, in which District Judge Woolsey said:

'In the first place, it must be remembered that, fortunately,

admiralty practice is plastic. It is largely judge-made, and consequently not technical-in fact, it is less technical than equity practice. Broadening from precedent to precedent, and based on a wisely administered convenience, admiralty practice has always been prepared to cope with new situations as they have arisen. (Citations omitted.)

' . . . there has never been any tendency in the rules which the Supreme Court has promulgated to limit the freedom of the District Courts in adopting new rules or principles of admiralty practice on appropriate occasion, provided the practice adopted does not conflict with the Supreme Court rules.

'I feel, therefore, that I am quite free to use my discretion in dealing with this new point in admiralty practice, and that it is my duty to exercise the power which I hold in trust for the benefit of litigants and to adapt admiralty procedure in this case to the practical needs of justice.' "

From the memorandum of decision put forth by the District Court, it is apparent that the Court conceded to the use of fictitiously named defendant in the Federal Court and more particularly that in the instant case, such a procedure was proper. (See Cl. Tr., p. 29, ll. 11-23.) It is from this point that appellant disagrees with the District Court in denying the motion to amend and basing the denial on the relation back aspect of the amendments under Rule 15 (c) of the Federal Rules of Civil Procedure. At the oral argument of the motion, it was

pointed out and the Court conceded that the filing of an action against a named defendant within the statutory period of time, service could be made on that defendant after the statutory period of time. (See Rep. Tr., p. 20, ll. 21-25, and p. 21, ll. 1-11.) It was further pointed out and apparently understood by the Court that, if a fictitiously named defendant was served after the running of the Statute of Limitations, such service would be proper and the defendant would be held to answer, specifically in the State Courts where such a practice is common place. (See Rep. Tr., p. 31, ll. 2-25, and p. 32, ll. 1 and 2.) It is at once apparent that the Court did not understand the proposition that once a defendant is named, whether named individually or fictitiously, then so far as that defendant is concerned the cause of action has been commenced and has always been maintained against the known, as well as the unknown defendants. The motion presented by appellant was merely to change the name of Doe I to read LITTON SYSTEMS, INC. Doe I had been sued within the statutory period of time and the change in the name does not involve any relating back problems that come into question under Rule 15 (c). The authority for the proposition put forth by appellant at the present time to the effect that you may serve a fictitiously named defendant after the running of the Statute of Limitations is the Phillips' case cited above. In that case, it is abundantly clear that the law suit was filed just prior to the running of the statute of limitations and a fictitiously named defendant was sued and after the statute had run, the libel was amended to change the name from Doe I to the true name of the defendant. In this case, the situation is no different than if LITTON SYSTEMS, INC., had been a named party and had been served at the same time and the same place as they were served with the service

being on them by their true names as against a fictitious name.

It is respectively submitted that the procedure used to serve LITTON SYSTEMS, INC. , as Doe I and move to amend the libel to show their true name is not within Rule 15 (c), since we are not trying to bring in a new defendant, after the running of the Statute of Limitations, but are merely identifying the party who had previously been sued as DOE I. Rule 15 (c) applies to a situation where there is actually a change in the party that is to be brought into the litigation and it is where there is an attempt to bring in a party who was not contemplated by the plaintiff at the time of the filing of the action, but who was found out later to be a party that could have been contemplated. The libel in this case clearly alleged a cause of action against 10 fictitiously named defendants and appellant clearly indicated an intention to sue these ten people, but at the filing stage she was not aware of their true names and capacities but she was aware that they were in existence. The District Court by its ruling here has said that the Statute of Limitations is in reality a statute of discovery. If a fictitiously named defendant must be served prior to the running of the Statute of Limitations then there is no reason to allow the use of fictitious names. If a litigant knows the name of a defendant within the statutory period it would not serve any purpose to sue him by a fictitious name and then serve him before the running of the statute.

However, when you do not know his true identity but do wish to commence the action on time, a fictitious name is used. This is exactly what appellant did here.

Adhering to the reasoning of this District Court, a named party can say

ou must serve me before the Statute of Limitations has run or else I will claim
 had no notice within the statutory period of the action. A Statute of Limitations is
 limitation on the exercise of a right not a limitation of notice to the proposed
 defendant.

II. Rule 15 (c) and its applicability.

Rule 15 (c) was amended in 1966, and, so far as pertinent to this discussion
 reads as follows:

"(c) RELATION BACK OF AMENDMENTS. Whenever the
 claim or defense asserted in the amended pleading arose out
 of the conduct, transaction, or occurrence set forth or attempted
 to be set forth in the original pleading, the amendment relates
 back to the date of the original pleading. An amendment changing
the party against whom a claim is asserted relates back if the
foregoing provision is satisfied and, within the period provided
by law for commencing the action against him, the party to be
brought in by amendment (1) has received such notice of the
institution of the action that he will not be prejudiced in main-
taining his defense on the merits, and (2) knew or should have
known that, but for a mistake concerning the identity of the
proper party, the action would have been brought against him.

. . . "

he underscoring sets for the new matter that was added by the amendment.

It is submitted that Rule 15 (c) does not apply to a case where the true

name and identity of a fictitious party is involved. Such a situation is not changing a party, it is merely changing the description of a party. See 3 Moore's Federal Practice, paragraph 15.08 (5), page 923, f.n. 15. When it is clear that the person before the court is the person the plaintiff intended to sue amendment should be allowed. See 3 Moore's Federal Practice, paragraph 15.15 (4-1), page 1040.

If Rule 15 (c) is controlling on the amendment sought then a careful reading of subdivision (1) should be undertaken. It specifically says that the defendant should receive notice of the action and not be prejudiced in his defense on the merits. The Advisory Committee's Note contained in 3 Moore's Federal Practice, 1967 Supplement at page 75 says:

" . . . received such notice of the institution of the action -

the notice need not be formal - that he would be prejudiced . . . "

and by such language indicates that some knowledge should be had by the defendant sought to be charged. In this case the affidavit of Harry R. Folk (Cl. Tr., pp. 70 and 71) clearly demonstrates that this defendant, LITTON SYSTEMS, INC., was aware of the accident and was investigating the same before it was officially apprised of the present case. It can hardly be said that the crash of an airplane resulting in the loss of life by the pilot and two legs by a seaman would be investigated two times; once when the seaman sued, and again when the pilot sued. Under the circumstances here LITTON SYSTEMS, INC. would not be prejudiced in its defense on the merits no matter when it was served with the instant libel. Its defense is the same to any and all claims arising out of this accident.

Further reflection on the import of the new amendment illustrates that

changes the Statute of Limitations applying to the Death on the High Seas Act from the date of commencement to one of discovery. The pertinent section is 46 U.S.C.A. § 763 and states:

"Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered."

This is a Federal Law enacted by Congress and clearly requires only the filing of an action within two years of the date of death, it does not require the discovery of the true home of all persons to be charged within the two years. Appellant has complied with the controlling Statute of Limitations and sued then defendants whose names and identities are not known and Rule 15 (c) cannot set up a new limitation. The amendment of a federally created right can only be done by the Congress of the United States.

It is a legal fiction to claim that the filing of any action gives notice to a defendant that he is being sued. If such were the case then there would not be any requirement of personal service. In order to give the court jurisdiction over a party there must be more than mere filing to apprise him of the suit. The filing is merely a requirement that there be a commencement within a certain period of

time. To require notice of the commencement of the action prior to the running of the Statute of Limitations changes the terms of the statute. Such a rule is permissible where the party has not been sued before and the plaintiff did not seek redress against him. This really does not change the purport of the Statute of Limitations. But here where a plaintiff sues a defendant who is not presently known to him by name, and does so within the statutory period, it is judicial legislation to tell him that before he can show his true name he must serve him prior to the running of the statutory period.

When fictitiously named defendants are permitted, the Statute of Limitations is complied with if suit is commenced within the proper time. This libel should be allowed to be amended to show the true identity of Doe I as LITTON SYSTEMS, INC. and they should be required to answer.

Respectfully submitted,

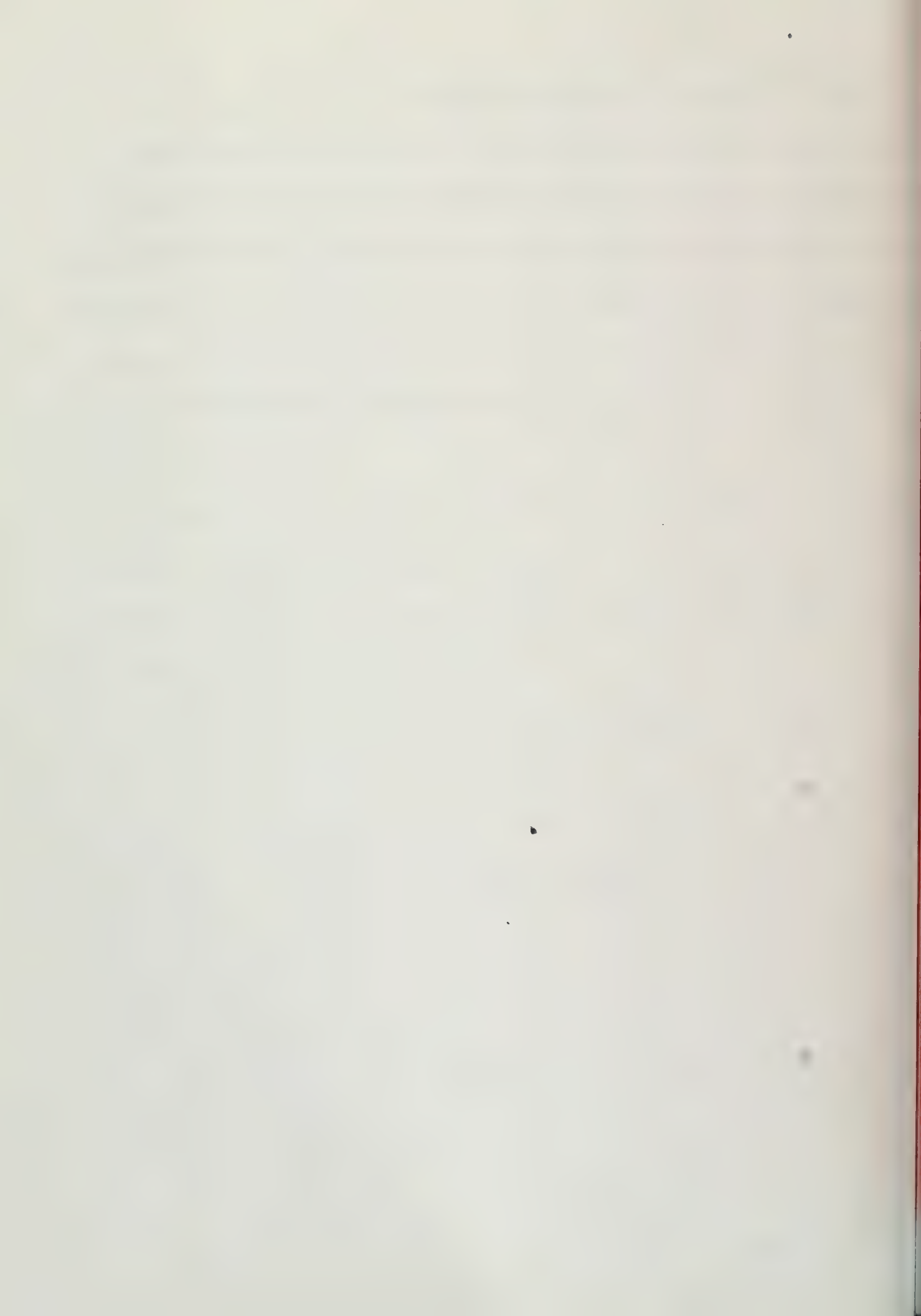
/s/ WALTER P. CHRISTENSEN

Attorney for Appellant.

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ WALTER P. CHRISTENSEN



No. 22319

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ELIZABETH ELAINE CRAIG, Administratrix of the Estate
of ROBERT J. CRAIG, deceased,

Appellants.

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California. Appellee: Litton Sys-
tems, Inc.

APPELLEE'S BRIEF

ROSCOE S. WILKEY,
CHARLES W. REES, JR.,
LAURENCE L. PILLSBURY,
Proctors for Appellee,
Litton Systems, Inc.

FILED

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Of Counsel.

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Appellees.

On Appeal From the United States District Court for the
Southern District of California. Appellee: Litton Sys-
tems, Inc.

APPELLEE'S BRIEF.

Statement of the Case.

On August 16, 1965 Libellant filed her libel pursuant to the provisions of the Death on the High Seas Act, Title 46, U.S.C., Secs. 761-768. Therein it is alleged that on August 19, 1963 Libellant's husband, a member of the U.S. Navy, died while attempting to land his airplane aboard the U.S.S. Constellation. She further alleges that the causes of the incident were negligence of the respondents and defects in the arresting gear equipment of the vessel [Clk. Tr. pp. 2-7].

The caption of the libel named five respondents by proper name, but included also respondents designated as "Does I through X" [Clk. Tr. p. 2].

The statute of limitations for actions filed under the Death on the High Seas Act is two years from the date of death. Title 46 U.S.C. Sec. 763; *Meuser v. Rutledge* (1962 S.D.N.Y.), 205 Fed. Supp. 208. The period thus expired August 19, 1965.

Service of an alias citation and copy of the libel upon Appellee Litton Systems, Inc., as "Doe I", was made on February 28, 1966 [Clk. Tr. p. 13]. Libellant does not contend that Litton had notice of the pendency of this action prior to service [Clk. Tr. p. 93, lines 2-4]. Further, Litton did not undertake investigative procedures with reference to the merits of this action until after such service, which occurred more than six months following the running of the statute of limitations [Clk. Tr. pp. 70-71].

Litton appeared specially, contending that in the light of the record, the alias citation was issued prematurely and that Litton had not properly been brought before the Court [Clk. Tr. pp. 16-21 and 28-29]. The Court sustained Litton's position [Clk. Tr. p. 30]. It ordered that Libellant move the Court to amend the libel to place Litton before the Court [Rep. Tr. p. 8, lines 2-14]. It further ordered, to save separate hearings, that Litton's exceptions to the proposed amended libel be heard at the same time [Rep. Tr. p. 4, lines 13-21; p. 6, lines 10-15; p. 9, lines 2-6].

On November 16, 1966 Libellant filed the motion to amend her libel to add Litton as a respondent. The motion was filed pursuant to Rule 15 of the F. R. Civ. P.

[Clk. Tr. pp. 31-32]. The motion and exceptions were heard December 29, 1966 [Rep. Tr. pp. 10-39].

Subsequently, the Court filed its Memorandum of Decision and therein denied Libellant's motion to amend to add Litton as a party respondent [Clk. Tr. pp. 91-93]. The basis of the Court's ruling was that Libellant failed to show that Litton was on notice of the pendency of the action prior to service of the citation on February 28, 1966 and that Litton had a right to rely upon the running of the statute of limitations. It held, consequently, that an amendment could not be made under Rule 15(c), F. R. Civ. P. so as to "relate back" to the time the original libel was filed so as to obviate the effect of the statute of limitations [Clk. Tr. pp. 91-93].

This appeal followed.

The question on appeal is, basically, whether the Trial Court was guilty of an abuse of discretion in refusing to allow the amendment. The subsidiary question is, under the circumstances of the case, whether the requirements of Rule 15(c) had been satisfied so as to obviate the operation of the state of limitations. The Court did not base its holding on the propriety of fictitious "Doe" defendants in an admiralty action, so that subject is here only a collateral inquiry as it relates to the holding of the Court.

ARGUMENT.

I.

The Court Did Not Abuse Its Discretion in Refusing to Allow the Amendment.

This Court has many times held that the determination as to whether to allow or refuse an amendment to a pleading is wholly within the discretion of the Trial Court. The Trial Court's holding will be disturbed on appeal only upon a showing of abuse of discretion. *C. E. Stevens Co. v. Foster & Kleiser* (1940 9 C.A.), 109 F. 2d 764, rev'd on other grounds, 311 U.S. 255; *Hancock Oil Co. v. Universal Oil Prods. Co.* (1941 9 C.A.), 120 F. 2d 959.

The rule in admiralty cases is the same. "The whole subject rests entirely in the discretion of the court . . ." 2 Benedict on Admiralty (6th Ed. 1940), Sec. 355, pp. 559-560. See also *U.S. Fidelity and Guaranty Co. v. United States* (1945 S.D.N.Y.), 63 Fed. Supp. 114, 1945 A.M.C. 747.

Rule 15(c) of the F. R. Civ. P. provides, as here pertinent, as follows:

"(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and within the period provided by law for commencing the action against him, the party to be brought in by amendment*

(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. . . .” (emphasis provided).

The provisions of the rule as apply to change of parties was not added until July 1, 1966. But courts had long before recognized that a party to be added after the running of the statute of limitations need have sufficient notice of the suit so as to prevent prejudice. The amendment to Rule 15(c) simply “clarifies” the law which pre-existed the change. *Cone v. Shunka* (1966 W.D. Wisc.), 40 F.R.D. 12.

This Court has cited notice of the pendency of the action as being a “controlling consideration” as to whether a change or substitution can be made as to a party. *Goodrich v. England* (1958 9 C.A.), 262 F. 2d 298, 301.

In the case at bar, there was no notice to Litton that this action existed until two years and six months after the accident had occurred, and this was six months following the running of the statute of limitations. No investigatory work was instituted as to Mrs. Craig’s case until that time [Clk. Tr. pp. 70-71]. Appellant claims that no prejudice would result to Litton if the amendment were allowed by virtue of the fact that an investigation had been undertaken with reference to an action pending in New York which arose from the same incident. That action is by a seaman aboard the vessel who sustained injuries—not death (See Appellant’s Op. Br. p. 16).

This claim is unsound. The instant case involves the death of the pilot of the airplane and the prayer for damages is \$750,000.00—not an insubstantial sum. Contributory negligence is an issue in a case based on the Death on the High Seas Act, 46 U.S.C. Sec. 766. Investigation of the accident as pertains to this action would necessarily encompass all acts and omissions of the deceased pilot whose widow is Libellant. It does not follow that investigation of one claim constitutes investigation of another. Rule 15(c) specifically states that a showing must be made that the party sought to be included in the action had notice of “institution of *the* action” (emphasis provided) within the statutory period. This showing is not made. The Trial Court exercised its broad discretion and refused to permit the amendment. It cannot be said that its exercise of discretion was unsound. Certainly it cannot be said that the discretion was abused so as to justify reversal on appeal.

II.

The Applicability of Rule 15(c) Is Clear.

Libellant seeks to avoid the provisions of Rule 15(c) by contending that it is not applicable to the amendment sought. She so contends on various grounds.

A. Amendment to Substitute a Party as “Doe I” Is Not an Amendment to Correct a Misnomer.

First, she cites Professor Moore’s volumes (see Appellant’s Op. Br. pp. 15-16) for the proposition that an amendment to substitute Litton as “Doe I” is not a “changing” of a party within the wording of Rule 15(c). But a reading of the cases cited by Professor Moore in his footnotes reveals that he refers only to

amendments to correct *misnomers* in the name of parties defendant.

Those cases are found respectively at 274 F. 2d 743, 97 F. Supp. 505, 287 F. 2d 95, 217 F. 2d 27 and 91 F. Supp. 652. In all these cases it is found that the defendant as named in the complaint was named in words very similar to his true name. More important, in each of the cases, the real defendant had notice of the pendency of the action. Correction of misnomers has been properly allowed by courts for many years. But "Doe I" assuredly is not a misnomer for Litton Systems, Inc.

B. Propriety of Fictitious "Doe" Respondents.

Second, she contends that the use of fictitious "Doe" respondents is proper in admiralty. Extending this argument, she contends that "Doe I" and Litton are one in the same and that since "Doe I" was sued before the running of the statute of limitations, so was Litton. She seeks to avoid characterizing the bringing of Litton into the case as a substitution of a party or as the addition of a new party. She thus contends that no "change" is made within the provisions of Rule 15(c). Yet it can only be such. The anonymity of "Doe I" is patent, and it remained such until six months after the statute had run.

The propriety of use of fictitious defendants in Federal cases—both in diversity cases and in cases founded upon a Federal law—is questionable at best. Further, if the device is to be permitted it should not operate so as to abrogate well established law requiring that a defendant be given seasonable notice that he is being sued.

Libellant relies entirely upon a District Court case decided in 1955, *Phillips v. The United States* (1955 N.D. Cal. So. Div.), 127 F. Supp. 12. Subsequent to that decision, higher courts and other District Courts have held to the contrary on the utilization of fictitious defendants. In 1959, this Court heard a case filed under the Civil Rights Act. *Hoffman v. Halden* (1959 9 C.A.), 268 F. 2d 280. As here, "Doe" defendants were named in the caption of the action. After the Statute of Limitations had run, the plaintiff attempted to add two party defendants to the action, and relied on the "relation back" provision of Rule 15(c) of the Federal Rules of Civil Procedure. The Court stated, at page 304:

"... but where new defendants are brought into the action, *without previous notice or service of process*, a different situation exists. This is like the institution of a *new action* against the *new parties*." (Emphasis provided).

The Court declined to invoke the "relation back" doctrine and the action was dismissed as to the two new parties.

In a diversity case this Court made a general comment on the use of fictitious defendants in Federal Courts.

"This attempt to join fictitious defendants is said to be justified in California practice. However that may be, no one of the Rules of Civil Procedure under which Federal Courts operate gives warrant for the use of such a device." *Molnar v. National Broadcasting Company* (1956 9 C.A.), 231 F. 2d 684, 687.

Sigurdson v. Del Guericco (1956 9 C.A.), 241 F. 2d 480, 482, was based on a Federal law—not on diversity—and fictitious defendants were held improper and were characterized as “dangerous”. The Court may well have had in mind the importance of notice to a potential defendant. Other cases holding fictitious defendants improper are *Roth v. Davis* (1956 9 C.A.), 231 F. 2d 681, *Glucksman v. Columbia Broadcasting System* (1963 S.D. Cal.), 219 F. Supp. 767, 768, and *Phillip v. Sam Finley Inc.* (1967 W.D. Va.), 270 F. Supp. 292. In the latter case, the complaint named “Doe defendants” and after the statute had run, plaintiff attempted to amend to substitute new parties for the fictitious defendants. The Court, in granting a motion for summary judgment, stated, in substance, that the plaintiff’s use of fictitious defendants does not create a new right to freely amend. The burden of finding the proper defendant is on the plaintiff and the plaintiff cannot toll the statute of limitations by filing against some fictional character. The Court found that it could not permit an amendment to relate back when such would materially affect a substantial right of the defendant—in this instance the right to rely upon the running of the statute of limitations.

C. The Trial Court Was Correct in Holding That Failure to Show Notice, Pursuant to Rule 15(C), Is Fatal to the Proposed Amendment.

The following will assume, for purposes of argument only, that fictitious defendants may be used in admiralty, subject to important limitations.

It has been shown that Federal Courts view the use of fictitious defendants with disfavor. In view of this, it is only fair and just that well established principles

—designed to protect unwary defendants—be invoked where fictitious defendants are used in a pleading.

The right of a defendant to rely upon the running of the statute of limitations is a substantial right. *Phillip v. Sam Finley Inc., supra*. In the instant case, Litton had the right to assume that Libellant would be satisfied with her widow's pension from the United States and that it would not be sued. It had no notice whatever, within the period of the statute, that it would be called upon to defend in this action.

It is firmly established in law that a person has the right to rely upon the running of the statute of limitations so long as he has no notice that he is being sued in the action. In *Hoffman v. Halden, supra*, the Court states at page 304:

“ . . . were defendants Wair and Hansen sufficiently apprized of the pendency of *the action* so as to prevent their reliance on the applicable Statute of Limitations? There is nothing in the record to so indicate.” (emphasis provided).

Notice to the defendant of the pendency of the action within the statutory period has been characterized as being the “paramount issue” in allowing or refusing an amendment after the statute has run. *DeFranco v. United States* (1955 S.D. Cal.), 18 F.R.D. 156. In that case, the Court discusses in detail the importance of notice to a defendant, as seen by Federal Courts.

Before the amendment to Rule 15(c), courts refused to permit amendment after the statutory period where notice was not shown to have been received within the period. See *United States v. Western Cas. and Surety Co.* (1966 6 C.A.), 359 F. 2d 521, *Cone v. Shunka*,

supra, *Martz v. Miller Brothers Company* (1965 D.C. Del.), 244 F. Supp. 246, *Aarhus Oliefabrik, A/S v. A. O. Smith Corp'n.* (1958 E.D. Wisc.), 22 F.R.D. 33, and *United States v Templeton* (1961 D.C. Tenn.), 199 F. Supp. 179. It should be noted that in the *Western*, *Cone* and *Martz* cases, it could easily be implied that the new defendant probably did have notice. Nevertheless, the courts refused amendment because of failure to show same.

Because of the established law, when the 1966 addition was made to Rule 15(c), it was only natural and consistent to adopt the period of the statute of limitations as the yardstick to measure the period within which notice must be received. The new rule has been applied since the change. *Burns v. Turner Const. Co.* (1967 D.C. Mass.), 265 F. Supp. 768.

Plaintiff contends that Rule 15(c) defeats the purpose of the statute of limitations and makes it a statute of discovery and not one of limitation. First, Appellee respectfully submits that the two are entirely in harmony. The rights of a defendant, say the cases, are keyed to notice. In a case such as this, he must have same within two years of the incident. If he has such notice, he can be brought into the case after the statute has run.

Libellant would characterize the statute of limitations as a weapon in her cause to utilize "Doe defendants" in the way she seeks. She then says Rule 15(c) blunts her weapon. But the statute of limitations certainly is not designed to promote the cause of plaintiffs against "Doe defendants." Rather, its purpose is akin to the "notice" requirement of Rule 15(c)—to give the defendant some protection.

Nor does the “notice” requirement vitiate “Doe” pleadings. An action can be filed, *e.g.*, a few months after an accident. The “Doe defendant” can be brought in by amendment after the statute has run. But the all-important notice—judicially established long before the amendment of Rule 15(c)—must have been received.

Nor does it, as contended, change the statute of limitations into a “statute of discovery”. An action may be filed shortly following an accident and discovery immediately instituted. Through discovery, a potential defendant will ordinarily discover the pendency of the action. If he does so, he can be included in the case even after the statute has run.

Libellant seems to view this case with only an eye to the long perpetuation of the rights of a plaintiff. In so doing, she overlooks the fact that a defendant must also have rights, and that the courts have long so held.

Libellant states (Appellant’s Op. Br. p. 5) that she could not possibly have known the identities of all defendants within two years of her husband’s death. But she fails to show why she could not have promptly filed the action and, through discovery, have determined all proper defendants within, for example, *one* year of the accident. She cites the complicated nature of the circumstances through which the accident occurred. Yet a defendant must have the same protection in a complicated case as he would have in simpler litigation. A defendant should not be penalized for lack of diligence on the part of a plaintiff. The record fails to show any reason why the action was not filed earlier. It further shows no formal discovery whatever.

It was shown to the Trial Court that in California State courts, "Doe" pleading is permitted and no notice of the pendency of the action need be given within the period of limitation [Rep. Tr. p. 31, line 22, to p. 32, line 16]. As has been seen, Federal courts have instituted the additional requirement of notice to a defendant.

While at first blush, this may seem unduly harsh upon a plaintiff who brings an action in a U. S. District Court under a federal law, a consideration of the differing statutes of limitation shows the wisdom of the additional "federal" requirement.

Under California law, all actions for personal injury or death must be filed within *one year* of the accident. *Calif. Code of Civ. Procedure*, Sec. 340.3. The one year period of limitations is not only applicable to negligence actions, but also is applicable in those founded upon breach of warranty. *Rubino v. Utah Canning Co.* (1954), 123 Cal. App. 2d 18, 266 P. 2d 163.

Under federal laws governing actions for personal injury and death, however, much longer periods are provided for the filing of actions. See, for example, the Jones Act and the F.E.L.A., wherein the period is three years. 46 U.S.C.A., Sec. 688; 45 U.S.C.A., Sec. 56; *Engel v. Davenport* (1926), 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813. The Tort Claims Act has a two year Statute of Limitations. 28 U.S.C.A., Sec. 2401(b). The same period is here applicable under the Death on the High Seas Act.

Accordingly, it can be seen that, with longer periods applicable, a defendant needs some protection from claims as to which he may be "kept in the dark" for an extended time. It is submitted that the "notice" re-

quirement, not applicable under California law, is a fair proposition.

Libellant also contends that if leave to sue Litton is not granted, she is foreclosed from suing any other proper party not named in the caption. This is not necessarily true. It may be that all proper respondents had notice of the pendency of this action within the two year period, whereas Litton did not. There is no showing one way or the other on this subject. If they had such notice, they can be sued.

Libellant implies that the "notice" requirement of Rule 15(c), is satisfied if, within the statutory period, the respondent has notice of the *incident* which gave rise to the cause of action, and that notice of the pendency of the action itself is not necessary (See Appellant's Op. Br. p. 16). She made this contention before the Trial Court, citing cases which were alleged to support that proposition [Clk. Tr. pp. 73-75]. The Trial Court properly found that none of those cases supports that position. In them, either no new defendants were sought to be added, or else the defendant had notice of the *action* within the period [Clk. Tr. p. 93, lines 5-20].

To the contrary, the courts have consistently held that notice of the *action* is required. See *Hoffman v. Halden*, *supra*, *United States v. Travelers Insurance Co.* (1966 D.C. Colo.), 40 F.R.D. 316, *United States v. Western Cas. and Surety Co.*, *supra*, *Cone v. Shunka*, *supra*, *Marts v. Miller Brothers Company*, *supra*, *Aarhus Oliefabrik, A/S v. A. O. Smith Corp'n.*, *supra*, *United States v. Templeton*, *supra*, and *DeFranco v. United States*, *supra*.

In *Barron and Holtzoff, Federal Practice and Procedure*, Vol. 1-A, Ch. 7, Sec. 448 at pages 768-769 it is stated:

“While amendments are often permitted to bring in additional parties, and the utmost liberality is exercised to correct a misnomer, if the effect of a proposed amendment is not merely to correct a misnomer but to substitute a new party for the one already named, the amendment amounts to a new and independent cause of action which cannot be permitted if the Statute of Limitations has run.”

As the Trial Court wisely stated:

“It is one thing to know of an occurrence which may give rise to a lawsuit, another to know you are being sued.” [Clk. Tr. p. 93, lines 23-25].

D. Serving a Party Sued as a “Doe” Cannot Be Characterized as Simply “Designating a Party” Already Sued. Such Party Can Only Be Seen as a New, or Substituted Party. Such Parties Cannot Be Included Unless They Had Notice Within the Statutory Period.

The “Doe defendants” as named in the caption are obviously not real persons. They are expressly designated as “fictitious” [Clk. Tr. p. 3, line 9]. Only upon service of the citation did Litton emerge as a possible party defendant. Under the law, plaintiff did not seek to give it such status until she filed to amend on November 16, 1966. It is thus a new party to the action, or one to be substituted by amendment for one of the “Doe defendants”.

As stated in *Hoffman v. Halden, supra*, at page 304:

“... this is like the institution of a new action against the new parties.”

It has also been held that where the defendant named in the original complaint is a non-existent agency, the proper party defendant cannot be substituted for it after the statutory period. *Cohn v. Federal Security Administration* (1961 W.D.N.Y.), 199 F. Supp. 884.

To further demonstrate that such are new parties, it is noted that an amendment of the pleadings is necessary to set forth the name of the new party. Admiralty Rule 23 provides that amendments shall be made on motion to the Court. Local Rule 104, Admiralty Rules, So. District Calif., required petition and notice to add or substitute a party. The analogous rule under the Federal Rules of Civil Procedure is Rule 21. Under this Rule, it has been held that an order of Court, pursuant to motion therefor, is necessary to change or to substitute a party. *Pacific Gas & Electric Company v. Fibreboard Products, Inc.* (1953 N.D. Cal.), 116 F. Supp. 377, 382, *National Maritime Union of America v. Curran* (1949 S.D.N.Y.), 87 F. Supp. 423.

In California, a state permitting the use of fictitious defendants, an amendment is likewise necessary. Calif. Code of Civ. Proc. Sec. 474.

Thus, the provisions of Rule 15(c), pertaining to amendment to change a party (and requiring notice) is clearly called into play.

In passing, it should perhaps be noted that plaintiff claims (the same not being admitted) that Litton is the successor of one of the named defendants. But successors in title or interest cannot be added after the statute of limitations has run. *United States v. Norris* (1915 8 C.A.), 222 Fed. 14, *O'Neill v. American Radiator Co.* (1942 D.C.N.Y.), 43 F. Supp. 543.

Conclusion.

The Trial Court did not abuse its discretion in refusing the amendment. Its order should be affirmed.

Respectfully submitted,

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Of Counsel.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with said rules.

ROSCOE S. WILKEY



31 1968
JAN 31 1968
NO. 22320

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PEMBERTON,

Appellant,

vs.

JAMES A. DAVIS,

Appellee.

BRIEF FOR APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

DEADRICH, BATES & LUND
and KENNETH H. BATES

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FILED

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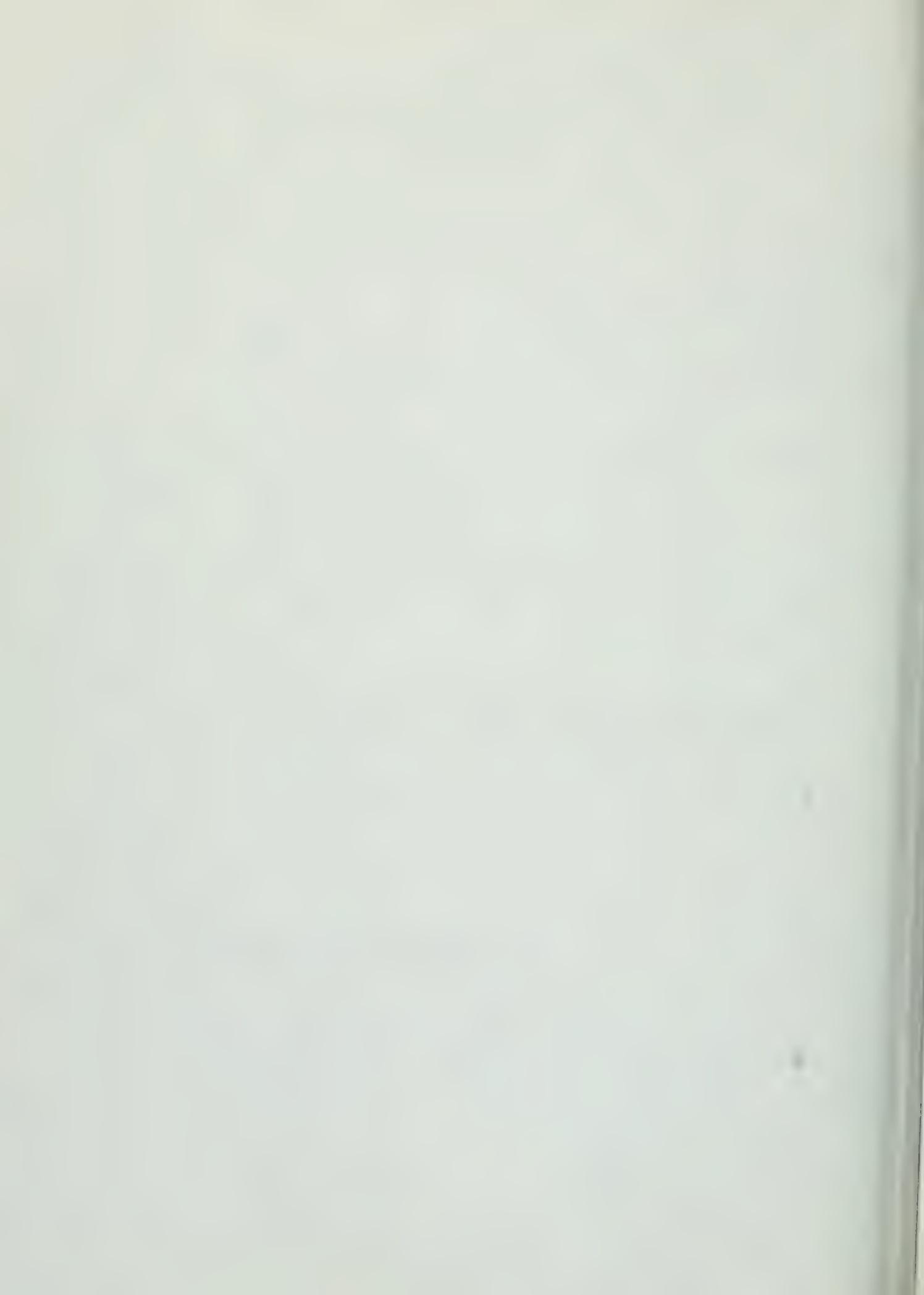
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PEMBERTON,

Appellant,

vs.

JAMES A. DAVIS,

Appellee.

BRIEF FOR APPELLANT

JURISDICTION

This is an appeal from a Decision on Review of an Order of the Referee in Bankruptcy, made by the United States District Court for the District of Nevada, which limited the lien claim of appellant Pemberton to the sum of \$272.04, reversed the order of the Referee which had allowed an additional \$250.00 for storage charges and upheld the denial of the claim of Pemberton to the sum of \$2,291.54.

The proceedings were initiated before the Referee in Bankruptcy by the Trustee's Application to Determine Claim of Pemberton Flying Service, and the Referee's Opinion and Decision was filed June 19, 1967, limiting the claim to a total of \$522.04

(Tr. of Rec. pp. 17-22), as opposed to Pemberton's claim of \$2,291.54. The matter came before the District Court on a Petition for Review (Tr. of Rec. pp. 23-25), and the District Court limited the claim to \$272.04 (Tr. of Rec. pp. 27-38). The Notice of Appeal was filed September 20, 1967 (Tr. of Rec. p. 39).

Jurisdiction of the lower court was conferred by Bankruptcy Act §§ 1 and 2(10) (11 U.S.C. §§ 1 and 11 (10)). Jurisdiction on the Appeal is based on Bankruptcy Act §24 (11 U.S.C. 47).

STATEMENT OF THE CASE

The Findings of Fact, filed by the Referee June 19, 1967 (Tr. of Rec. pp. 19, 20) set forth the following facts as to which there is no real argument, namely:

William Garnick, president of Midwest Livestock Company, delivered a Cessna aircraft to Pemberton Flying Service, on August 30, 1963, for repairs. These repairs, amounting to a total of \$272.04, were completed in 10 days, or about September 9, 1963. On September 19, 1963, the Sheriff of Kern County, California, acting under the authority of a writ of attachment issued by the Kern County Superior Court in a civil action filed by Bill Harris and others against Garnick, Midwest and others (Tr. of Rec. p. 52), took possession of the aircraft, and verbally instructed Pemberton to hold the aircraft in storage. Pemberton continued to hold the aircraft until January 21, 1965, when the Sheriff released the attachment (Exhibit A, Tr. of Rec. p. 46), which date was the

same date on which the Trustee in the debtor proceedings commenced proceedings to have the attachment lien declared null and void (Tr. of Re. pp. 2-5).

The aircraft remained in storage with Pemberton after January 21, 1965 and until April 19, 1965, when the aircraft was finally sold by the Trustee, and the purchaser took possession. The total time during which the aircraft was in storage from the time of attachment to delivery was 577 days, and the reasonable value of the storage would be the sum of \$3.50 per day.

A creditor's petition in involuntary bankruptcy had been filed against Midwest Livestock Commission Company on October 22, 1963 (Tr. of Rec. p. 88), Midwest filed a Petition for Proceedings for the Reorganization of the Corporation, under Chapter X of the Bankruptcy Act on April 17, 1964 (Tr. of Rec. p. 89), and a Trustee for the debtor was appointed April 24, 1964 (Tr. of Rec. p. 89). No officer of the debtor made any attempt to take possession of the aircraft, nor did any officer of the bankruptcy court make any attempt to take charge of the aircraft until January 21, 1965 (Tr. of Rec. p. 2).

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that Pemberton had no statutory lien rights for reasonable storage charges for the periods of time during which the aircraft was left with him in storage, that is, for the period of 490 days, from September 19,

1963 to January 21, 1965, when he held it at the direction of the Kern County Sheriff, and for the further period of 87 days, from January 21, 1965 to April 19, 1965, when he held it for disposition by the bankruptcy court.

QUESTIONS PRESENTED

1. When an aircraft is seized under a valid writ of attachment by an appropriate officer, and such officer places the aircraft in storage, does the person providing such storage have a lien for the storage charges which is valid as against the owner of the aircraft?

2. Does the person providing storage of an aircraft which was placed with him in storage by one having authority to do so, have a lien for the reasonable value of storage for the period of time that the trustee in a subsequent bankruptcy proceeding involving the aircraft's owner allows the aircraft to remain in storage?

ARGUMENT

I

A STATUTORY LIEN FOR STORAGE CHARGES
ARISES IN FAVOR OF THE PARTY WITH
WHOM AN AIRCRAFT IS PLACED BY A SHER-
IFF WHO HAS TAKEN LAWFUL POSSESSION
OF THE AIRCRAFT UNDER A WRIT OF
ATTACHMENT.

Section 1208. 61 of the Code of Civil Procedure of the
State of California provides:

"Subject to the limitations set forth in this chapter,
every person has a lien dependent upon possession
for the compensation to which he is legally entitled
for making repairs or performing labor upon, and
furnishing supplies or materials for, and for the
storage, repair, or safekeeping of, any aircraft,
also for reasonable charges for the use of any land-
ing aid furnished such aircraft and reasonable land-
ing fees. "

The primary question of law for resolution on this appeal
is the question of whether or not a keeper is entitled to a lien
for storage of a property such as an airplane when the storage
was done at the direction of a police officer under a writ of attach-
ment. There are few, if any, cases involving lien rights for the
storage or repair of aircraft but because of the similarity in the
language of the statutes governing the lien rights of a garage keeper

and the lien rights of one who repairs or stores aircraft, the cases under a garage keeper's lien are in point.

One California case comes closest to a direct answer to the question presented in this appeal and this is the case of Bentinck v. Menotti, 97 Cal. App. 412, 275 Pac. 850. In the Bentinck case, Mr. Bentinck was a defendant in a civil action and his car was picked up on a writ of attachment. The levying officer placed the car in the garage where it remained for approximately three (3) months, and the constable was then directed to release the car. As the opinion states, the constable notified the garage keeper to deliver the automobile to either Mr. Bentinck or his attorney upon payment of the garage keeper's fees for storing and keeping the automobile. Mr. Bentinck refused to pay storage charges and brought an action in claim and delivery; in this action, the trial court held against him, giving judgment in favor of the constable and the garage keeper. The Court of Appeal affirmed the ruling, stating:

"Was the appellant obligated to pay the storage fees before he could claim possession of his automobile? We think it is clear that the obligation to pay the garage fees rests upon the appellant; the automobile being lawfully in the possession of the respondents by virtue of the attachment and the placing of the same in the garage for safekeeping, the storage costs became a lien upon the automobile (Civil Code 3051, 3057). "

The issue presented on this appeal was the subject of an annotation in 48 A. L. R. 2d 912, where the note writer points out that there is a division of authority, some cases holding that where the motor vehicle involved was stored with the garage keeper at the direction of a public officer, sheriff or marshal, the courts have held that the garage keeper was not entitled to a lien (citing cases in Alabama, Iowa, New York, South Dakota, Utah and Missouri); the note then continues with the statement that, however, in a number of cases, a garage keeper was allowed a lien for services for storage of a motor vehicle which had been incurred at the request of a public officer (citing cases in Alabama, California, Mississippi, Louisiana, Tennessee and Oklahoma).

An examination of the cases cited for the proposition that the lien is not allowed, indicates that these generally involve a situation where the public officer who had directed the storage had no authority to direct the storage. Thus, in Lewis v. Best-by-Test Garage, 200 Iowa 1051, 205 N. W. 983, the bailiff levied execution on a truck owned by the plaintiff but levy was made on the assertion that the truck belonged to another man of similar name. Plaintiff, Lewis, gave immediate notice of ownership and the execution was released, and as the opinion notes, "The evidence as to the ownership of the truck is not in dispute". The appellate court then concluded that the garage man had no lien as against the plaintiff.

In Auto Dealers Discount Corp. v. Budd, 242 App. Div. 37, 272 N. Y. S. 893, the defendant sheriff stored the car without legal authority, hence the garage had no lien; in Brown v. Ace Motor Co.,

30 Ala. App. 479, 8 So. 2d 585. the officer ordered a disabled car towed away and stored and the appellate court held that the officer had no such authority, hence no garageman's lien was created.

On the other hand, the cases cited in the annotation in 48 A. L. R. 2d 912, for the proposition that a garage owner is allowed a lien for services for storage of a motor vehicle incurred at the request of a public officer involve citations where the sheriff was acting under proper authority, such as a writ of attachment. Among the cases cited are Grace v. Wooley, 26 Ala. App. 83, 174 So. 799, where the owner had brought the car to the garage for repairs and an attachment was levied upon the vehicle while it was in the garage. The lien rights were then upheld.

In McJunkin v. Chattanooga Garage, 166 Tenn. 457, 63 S. W. 2d 517, the sheriff had levied an attachment on a car and the conditional vendor presented a claim. The lien was upheld as valid, the court stating that, "The possession of the officer, being lawful, carried with it the same right the owner had to do with the car what was necessary for its protection and preservation."

We find it difficult to distinguish the case at bar from the Bentinck v. Menotti case, and as we have indicated, the Bentinck case adopted the same approach as that in McJunkin v. Chattanooga Garage, 166 Tenn. 457, 63 S. W. 2d 517. That is, that where the possession of the levying officer was lawful, that possession carried with it the same right that the owner had to protect and preserve the car.

As we have pointed out in another portion of this brief,

the aircraft was brought in for repairs and after the repairs were completed, the levy of attachment was made and from that date until the levy of attachment was released, the aircraft was held in storage at the direction of the sheriff, the party having lawful possession of the same.

II

PEMBERTON'S LIEN RIGHTS ARE NOT CUR- TAILED BY THE EFFECT OF §2892 OF THE CALIFORNIA CIVIL CODE.

Section 2892 of the California Civil Code states:

One who holds property by virtue of a lien thereon, is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under sections eighteen hundred and ninety-two and eighteen hundred and ninety-three.

The District Court for the District of Nevada placed reliance upon this section, and the recently decided case of Owens v. Pyeatt, 248 Cal. App. 2d _____, 57 Cal. Rptr. 100, 248 A. C. A. 987, the only reported case interpreting §2892. The Owens case held that a garageman who had made repairs on an automobile was not entitled to reasonable storage charges for the period during which he retained possession of the car in exercise of his lien for the cost of repairs. We respectfully submit that the case is distin-

guishable upon the facts.

In Owens v. Pyeatt, plaintiff Owens was a garageman who had made repairs to defendant Pyeatt's car, and, after completion of the repairs, refused to release the car to Pyeatt until Pyeatt had signed a release required by Pyeatt's insurance carrier. Owens eventually sued for the cost of repairs plus reasonable storage, and prevailed in the trial court, but upon appeal, the California Court of Appeal reversed, stating:

"It also appears plaintiff retained possession of the automobile to protect their garagekeepers lien
A garageman who retains possession of an automobile repaired by him in the exercise of his right to claim a lien thereon is not entitled to the reasonable value of the storage thereof during the time he keeps it in his possession (Civil Code §2892; see also Moss v. Odell, 141 Cal. 335). Plaintiffs' claim against Pyeatt for storage is not supported by the evidence."

In the case presently here for review, Pemberton did not retain possession of the aircraft in exercise of his right to claim a lien for the repairs; on the contrary the evidence is undisputed that the repairs had been completed and was being held for delivery to the owner when the Kern County Sheriff placed the property under lien of attachment arising out of a civil action in which Pemberton was in no way involved. By its own terms, California Civil Code

§2892 applies to: "One who holds property by virtue of a lien thereon . . ." and Pemberton was not holding the aircraft by virtue of the assertion of a repairman's lien, but instead was holding it in storage at the direction of the Sheriff.

All parties recognized this to be the case; for example in the first petition filed by the Trustee having any reference to the aircraft, the Petition to declare liens null and void filed January 21, 1965 (Tr. of Rec. pp. 2-4) the prayer for relief was:

1) That this Court determine said attachment of BILL HARRIS and MALCOLM HARRIS doing business as HARRIS BROS. to be null and void and discharge the said aircraft from the lien thereof, and that the Sheriff of Kern County California be directed to deliver said aircraft to the Trustee herein. (Tr. of Rec. p. 4)

and the Order made upon this petition was generally in accord with that prayer (Tr. of Rec. pp. 8-11).

As further indication of the manner in which the aircraft was held in storage, Pemberton submitted statements to the Sheriff for storage fees (Exhibits B, Tr. of Rec. pp. 47, 48).

We respectfully submit that the facts here do not present a case within §2892 of the California Civil Code nor within the rule of law announced in Owens v. Pyeatt, supra.

III

PEMBERTON IS ENTITLED TO STORAGE
LIENS FOR THE PERIOD FROM JANUARY
21, 1965 TO APRIL 19, 1965, WHILE THE
AIRCRAFT WAS LEFT IN HIS POSSESSION
BY THE TRUSTEE.

The facts are undisputed that the aircraft was left in Pemberton's care after the release of the attachment and until its eventual sale, a period from January 21 to April 19, 1965 apparently because the Trustee in the debtor proceedings preferred to do so. Clearly, this storage was not within the prohibition of Civil Code §2892 as storage resulting because Pemberton was holding it for his repair lien. At the very least, Pemberton is entitled to storage charges for this 87 day period, at the rate determined to be reasonable by the Referee, the rate of \$3.50 per day, or a total of \$304.50.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order, denying appellant's claim of \$2,291.54 and allowing it only in the sum of \$272.04, should be reversed, and the cause remanded with instructions to allow the claim in full, as a lien against the sale proceeds.

Respectfully submitted,

DEADRICH, BATES & LUND
By KENNETH H. BATES

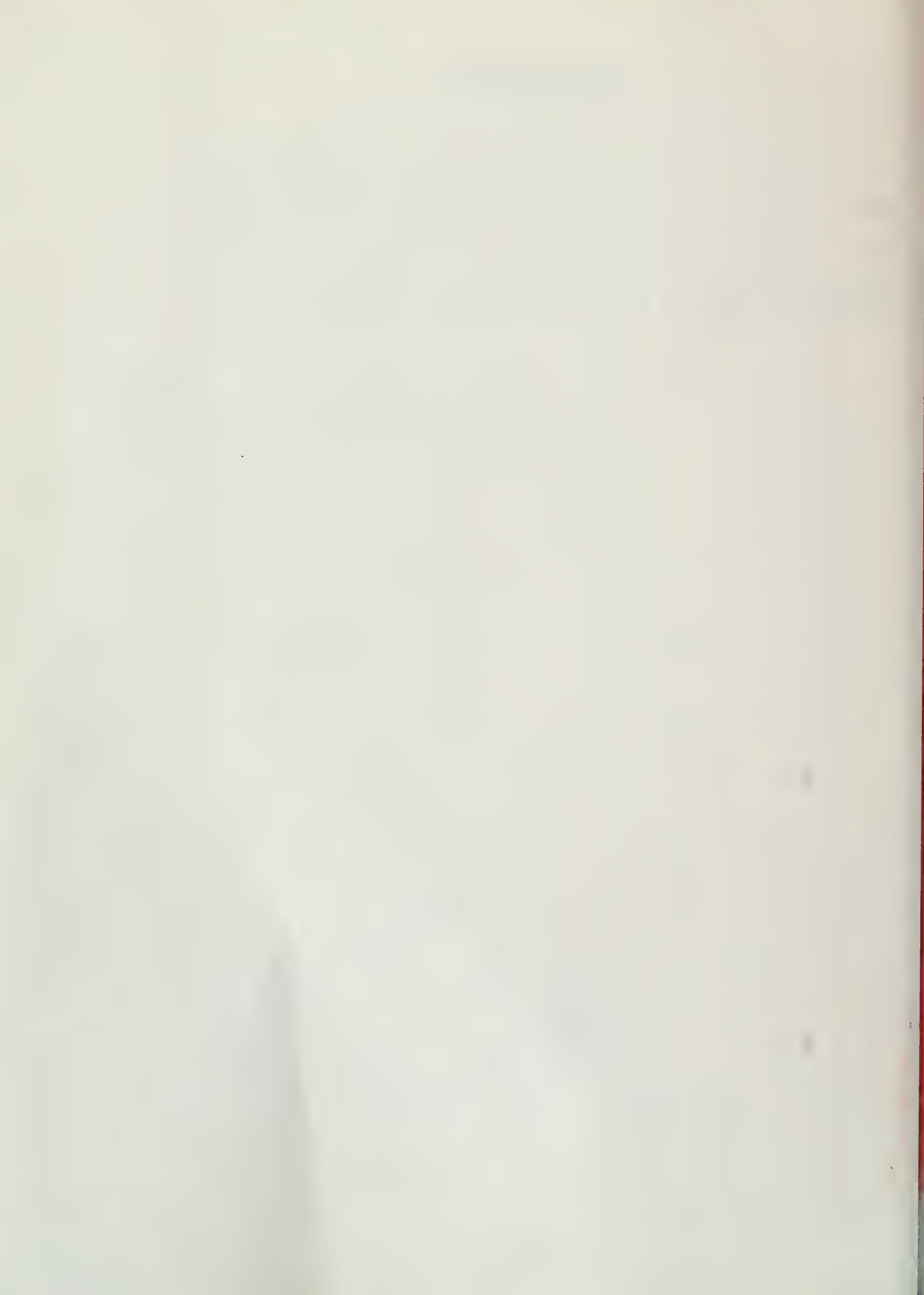
Attorneys for Appellant,
Roy Pemberton

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Kenneth H. Bates

KENNETH H. BATES



No. 22,320

IN THE

United States Court of Appeals
For the Ninth Circuit

ROY PEMBERTON,

vs.

JAMES A. DAVIS,

Appellant,

Appellee.

APPELLEE'S ANSWERING BRIEF

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FILED

FEB 22 1968

WM. B. LUCK CLERK

MAR 7 1968

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No. 22,320

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ROY PEMBERTON,

Appellant,

VS.

JAMES A. DAVIS,

Appellee.

APPELLEE'S ANSWERING BRIEF

JURISDICTION

Appellee agrees with Appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellee also agrees with Appellant's statement of the facts, except that the Court should also know that when the aircraft in question was sold, it was sold by order of the District Court which order directed that Appellant's lien, if any, attach to the proceeds of the sale with the amount of the lien to be determined at a later date (Tr. of Rec. 11, L 9). After the aircraft was sold a hearing was held before the Referee in Bankruptcy to determine the amount of Appellant's

lien following which the Referee allowed the repair lien of \$272.04 and a storage lien of \$250.00 (Tr. of Rec. 22, L 25). Appellant took the matter to the District Court seeking an increase in the amount of the storage lien, but instead of granting an increase, the District Court eliminated the lien of \$250.00 allowed for storage, leaving Appellant with \$272.04 for the repair lien (Tr. of Rec. 38, L 9).

ARGUMENT

I

A PARTY STORING AN AIRCRAFT FOR AN ATTACHING OFFICER DOES NOT HAVE A LIEN UPON THE ATTACHED AIRPLANE FOR STORAGE CHARGES

Appellant is not entitled to a lien on the airplane for storing it for the Sheriff. Even if such a lien were found to exist in this case, it could not be for more than \$250.00 since Appellant did not give the legal owner notice of the storage and obtain a written consent from the owner as required by C.C.P. Section 1208.62.

“Amount of lien; notice to and consent of legal owner and mortgagee. That portion of such lien in excess of two hundred fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work

or services are performed. For the purposes of this chapter the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner.”

For further discussion of this point see the Referee’s opinion herein commencing at page 20 of the Record. The District Court agreed that at most the storage lien could be \$250.00.

“If a sheriff holding property under attachment can subject that property to an encumbrance for the benefit of a third person, we have no difficulty in agreeing with the Referee that section 1208.62 is applicable to a bailment for safekeeping or storage, as being one for ‘services’ within the meaning of the statute. Cf. *People v. McCord*, 59 P. 2d 587. If Pemberton has any storage lien at all, it is limited to \$250.” Tr. of Rec. 31, L 18 to 32, L 1.

Appellant has not argued the application of C.C.P. Section 1208.62 and totally ignores it in attempting to recover for the storage. There is, and can be, absolutely no evidence that the written consent of the owner was given to the storage of the airplane. The storage lien cannot exceed \$250.00.

The real question is whether a lien for \$250.00 for storage can be allowed. Appellee can do no better in briefing this point than the quote from the excellent opinion of the District Court:

“For us, the more difficult concept is the holding by the Referee that a sheriff or constable who obtains possession of personal property of an-

other by levy of a writ of attachment has the power to subject that property to an encumbrance which is enforceable against the true owner by a third person. If this is the law, the hazards are obvious and are dramatically illustrated by the facts of this case. Here attached property, which was ultimately sold for \$5,010, is claimed to be subject to a storage lien in the amount of approximately two-fifths of its value, enforceable for the benefit of a person with whom the sheriff dealt while holding the property under attachment and continuing in effect after the attachment was unconditionally released. It is also noted that while holding the aircraft for the Sheriff, storage was billed at \$5 per day, but in Court, Pemberton claimed and proved only \$3.50 per day as the reasonable value of the services.

If the limited right to possession acquired by a Sheriff under a writ of attachment empowers him, by his voluntary act, to subject the property to statutory liens for storage, repairs and services rendered with respect to the property, we see no reason why he could not execute a chattel mortgage on the property as security for the cost of such work or services; yet, we have no doubt such action would be held to be a wrongful conversion of the property by the Sheriff.

There is an astonishing dearth of precedent on the precise point with which we are concerned. 6 Am. Jur. 2d 922, § 509; 95 A.L.R. 1529. Pemberton claims that the right to a storage lien on bailment by an attaching sheriff has been settled in California, the controlling law here, and cites *Bentinck v. Menotti*, 275 P. 850, and *Newell v. McDonald*, 212 P. 389. Our review of these and other California authorities does not persuade us

that this is so. The relationships created by the Sheriff's possession of property under attachment have been variously characterized. California Courts have said that the sheriff is the agent of the attaching creditor and not of the Court, and have pointed out that the attachment may be dissolved or released by ex parte direction of the attaching creditor without court intervention. In *United States Overseas Airlines v. County of Alameda*, 45 Cal. Rptr. 337, the Court reviewed California authority and said:

'Not not was the airplane not "in litigation" but it was also not in the possession of any of the depositaries listed in section 983. The sheriff is not among those designated by the statute nor does the sheriff's levy bringing the property within the "possession" of the court. The issuance of the writ by the clerk and its levy by the sheriff are ministerial acts, not judicial proceedings (*Wheeler v. Farmer*, 38 Cal. 203, 216; *Hayward Lumber & Inv. Co. v. Biscailuz*, 47 Cal. 2d 716, 721, 306 P. 2d 6). A sheriff serving a writ of attachment is an officer of the court (*Sparks v. Buckner*, 14 Cal. App. 2d 213, 220, 57 P. 2d 1395) but is not its agent. He is the agent of the attaching creditor and the attached property in the custody of the sheriff is constructively in the possession of the attaching creditor (*McCaffey C. Co. Inc. v. Bank of America*, 109 Cal. App. 415, 423, 294 P. 45). The levying officer acquires only a special lien dependent on possession which authorizes him to hold the property (Civ. Code, § 3057; Code Civ. Proc. § 542) for the benefit of the attaching creditor (*United States v. Fisher*, D.C., 93 F. Supp. 73, 75). An attachment does not affect

the general title of the owner of property who retains the power to sell or assign subject to the attachment (6 Am. Jur. 2d, Attachment and Garnishment, § 459, p. 881; § 503, p. 918).'

See also: *Perrin v. McMann*, 31 P. 837. It has also been held that the keeper designated by the Sheriff is the agent of the Sheriff for whose wrongful use or disposition of the attached property the Sheriff is liable. *Aigeltinger v. Whelan*, 65 P. 125; *Newell v. McDonald*, 212 P. 389; *Reynolds v. Lerman*, 292 P. 2d 559.

It should also be observed that the sheriff himself is given a statutory possessory lien (C.C. § 3057) which secures payment to him of the costs and expenses of safely keeping the property. *Perrin v. McMann*, 31 P. 837; *Newell v. McDonald*, 212 P. 389; *United States v. Fisher*, D.C. Cal. 1948, 93 F. Supp. 73; *Allen v. Clark*, S.D. Cal. 1938, 22 F. Supp. 898.

While the sheriff has a statutory lien on attached property to secure payment of his fees and costs, the plaintiff attaching creditor is primarily liable therefor and the California statutory scheme contemplates that the sheriff should keep such payments current by requiring advance deposits from and making re-current demands upon the attaching creditor [C.C.P. §542(5)]. In *Allen v. Clark*, supra, Judge Yankwich wrote:

'The law governing the rights of sheriffs applies to the marshal in this district, both under the Conformity Act, 28 U.S.C.A. § 726 and our local rule 57. An attaching officer, before levy, may demand a deposit of sufficient money to take and keep personal property for five days.

From time to time, he may make further demands for deposits for five-day periods. If this money is not paid, he may release the property "*to the person or persons from whom the same was taken.*" And "*There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section shall have been fully complied with.*" Code Civ. Proc. § 542, subd. 5, as amended by St. Cal. 1937, p. 1617. (Italics added.)

The California Civil Code gives the attaching officer a lien on the property. Civ. Code Cal., § 3057. In applying the section, courts have held that it justified the officer's or his agent's refusal to release the attachment unless the fees are paid. *Perrin v. McMann*, 1892, 97 Cal. 52, 31 P. 837; *Robinett v. Connolly*, 1888, 76 Cal. 56, 18 P. 130; *Bentinck v. Menotti*, 1929, 97 Cal. App. 412, 275 P. 850.'

We have found no case discussing the problem arising where a sheriff negligently fails to require payments from the attaching creditor and permits a large account to accrue for the safe-keeping of the property. The extent of the sheriff's lien may be limited or affected by such neglect to perform his official duties.

The California courts have also definitively concluded that if an attaching sheriff does bail the attached goods to a warehouseman and the latter sells the property in enforcement of his presumed warehouseman's lien, he is acting as the agent of the sheriff and the sheriff, as principal, is liable for conversion for the unauthorized sale. *Reynolds v. Lerman*, 1956, 292 P. 2d 559; *Aigeltinger*

v. Whelan, 1901, 65 P. 125. It occurs to us that a ruling that a sheriff is guilty of conversion of attached goods sold by his agent, the warehouseman, in enforcement of a statutory storage lien, is inconsistent with the thought that the limited possessory right acquired by a sheriff by levy of attachment gives him power to impose a lien on the property for the benefit of a third person.

It is the general rule that the lien of a bailee of a chattel arises only where his employment is by the owner or by one acting with the owner's consent, express or implied. 8 Am. Jur. 2d, § 269, p. 1156; 48 A.L.R. 2d 907. So California has held that no lien for storage is acquired on bailment by a thief, *General Exchange Ins. Corp. v. Pellissier Square Garage*, 1937, 69 P. 2d 237, and in other cases, the limited authority of the bailor has been relied upon to prevent the attachment of a statutory lien to bailed property. *Lowe v. Woods*, 1893, 34 P. 959; *McTigue v. Arctic Ice Cream Supply Co.*, 1913, 130 P. 165. These rules may, of course, be changed by statute (Cf. *Davenport v. Grundy Motor Sales Co.*, 1915, 152 P. 932), but we find no language in the aircraft lien law which would warrant implication of a change from settled general principles and conclude, for example, that no lien against the aircraft for work ordered by a thief would be enforceable against the true owner.

It is possible to read, as does Pemberton, the cases of *Bentinck v. Menotti* and *Newell v. McDonald*, supra, as authorizing an enforceable storage lien against a bailment of goods by an attaching sheriff. In both the cited cases, however, the sheriff or constable himself refused to release the

property except on payment of the storage fees and was, in truth, enforcing his own statutory lien and not that of the warehouseman. See *Allen v. Clark*, supra. The Court, in the *Newell* case, in fact characterized the ex parte refusal of the garageman to release the property on order of the sheriff as possible 'insubordinate conduct' of an agent toward his principal.

The distinction between the lien of the sheriff and the lien claimed by the sheriff's bailee may, on casual reflection, appear to be a distinction without a practical difference; but it does have the plain advantage of recognizing the inability of the sheriff to encumber property held under attachment and will permit judicial control of the scope of the sheriff's lien where he has failed and neglected to obtain payment of or security for keeper's costs from his principal, the attaching creditor, in the manner contemplated by C.C.P., § 542(5). 'The bailee is generally held to have no lien on property for his storage charges as against the true owner where it is left with him by public officers after seizing it from such owner, either for some alleged violation of law or upon an attachment, at least in cases where the proceedings against the owner have terminated without the entry of any judgment against the property.' 8 Am. Jur. 2d, p. 1157, Sec. 270. On January 21, 1965, the Sheriff of Kern County unconditionally released the attachment on the subject aircraft. His official lien depended on possession (C.C. § 3057) and was released when he abandoned possession and control. Pemberton had no statutory storage lien while he had custody of the aircraft as agent of the Sheriff. The pro-

ceedings before this Court, which resulted in the sale of the aircraft, showed that between January 21, 1965 and the date of sale, Pemberton had a valid lien for repairs in the amount of \$272.04 which was never contested by anyone, but also asserted a non-existent lien for storage approximating \$2,000, payment of which was a condition to release of the property. Pemberton cannot claim a storage lien for any of the period of his possession of the aircraft during which he refused to release possession unless an invalid lien claim should be paid. Pemberton must be remitted to his remedies against the sheriff of Kern County." Tr. of Rec. 32, L 2 to 38, L 7.

Should this Court not agree with the District Court, the most that can be allowed for the storage lien is \$250 as earlier discussed.

II

EFFECT OF SEC. 2892 OF THE CALIFORNIA CIVIL CODE

Appellant attempts to avoid the force of C.C. 2892 which prohibits a storage lien accruing when property is held under a repair lien by arguing that Appellant was holding the property for the Sheriff, not because any repair lien was claimed. This is just contrary to the facts. Appellant has always claimed a repair lien.

Appellant's claim filed in the bankruptcy asserts the repair bill is a secured claim (Tr. of Rec. 13).

The very hearing before the Referee which resulted in this appeal was to determine the amount of Appellant's repair lien (Tr. of Rec. 18, L 7).

Appellant has accepted, by not appealing, the order of the Referee allowing \$272.04 for the repairs (Tr. of Rec. 22, L 25) which as observed by the District Court, was a finding that Appellant had a valid lien of \$272.04 for the repairs.

“On June 19, 1967, the Referee filed his Findings of Fact, Conclusions of Law, Opinion and Decision, in which he concluded that the lien of Pemberton Flying Service in the amount of \$272.04 for repairs to the aircraft ordered by the owner prior to bankruptcy (which had not been contested by the Trustee) should be allowed . . .”
Tr. of Rec. 29, L 14-19.

Appellant should not be allowed to accept a lien for repairs, which can only be based on Appellant's possession of the aircraft and yet attempt to say that Appellant wasn't holding possession for itself but only as an agent for the Sheriff. Appellant is attempting to arrange the facts to fit the law because Appellant now recognizes that he cannot hold possession of an aircraft under a repair lien and claim a storage lien for the period the aircraft is so held.

Appellant argued very differently before the Referee:

“The Referee: Your contention of the law is that if a man has a \$270 bill, he is entitled to hold the aircraft until he is paid that \$270 and, in addition, he is entitled to add to his bill the storage charges until he is paid, as part of his lien?

Mr. Bates: That is right, sir. California law gives the * * *”. Tr. of Rec. 76, L 15-22.

This argument is an admission that Appellant was attempting to do that which C.C. Sec. 2892 prohibits; that Appellant was holding the aircraft under a claim of lien for repairs and at the same time attempting to assert a lien for storage while so holding the aircraft.

It may well be that Appellant was holding the aircraft for the Sheriff during the attachment period but Appellant cannot expect this Court to believe that he would have released the aircraft to the Sheriff, the Trustee in Bankruptcy or anyone else, without being paid his repair bill. The Trustee did not ask him to do so as it would have been a useless act.

III

STORAGE PERIOD OF JANUARY 21, 1965 TO APRIL 19, 1965

Appellant argues that the aircraft was left with Appellant from the date the Sheriff released the attachment, January 21, 1965, to the date of the sale of the aircraft, April 19, 1965, "apparently because the Trustee in the debtor proceedings preferred to do so" (Appellant's Opening Brief, P 12).

This just is not so. The Record shows clearly what happened.

On the very day the Sheriff released the attachment, the Trustee in Reorganization filed his petition asking the Sheriff's liens and Appellant's liens be declared void (Tr. of Rec. 2). An Order to Show Cause was issued the same day (Tr. of Rec. 6), the hearing thereon was held March 3, 1965, and the District

Court's order thereon made March 15, 1965 (Tr. of Rec. 8). The order directed the property be appraised and sold at as early a date as possible (Tr. of Rec. 11, L 9). The sale was held and the aircraft taken from Appellant April 19, 1965, a little more than a month later.

Appellant failed to appear at the hearing on the Order to Show Cause as shown by a recital in the order (Tr. of Rec. 8, L 28). The Trustee's belief regarding Appellant's reasons for holding the aircraft are asserted in the Trustee's petition for the Order to Show Cause.

“... that Petitioner is informed and believes that said flying service claims a lien thereon for repairs and storage thereof.” Tr. of Rec. 3, L 8.

The Order to Show Cause also reflects that Appellant was holding possession because of a claim of lien for repairs and storage.

“... that said flying service may have a lien on said aircraft for repairs and storage, the existence and amount of which will be determined at a later date.” Tr. of Rec. 9, L 27.

It is too late, now, for Appellant to attempt to take the position that it was not holding the aircraft on a claim that it had a repair lien. Since Appellant did so hold the aircraft, he is limited to his repair lien and cannot have a storage lien because of C.C. 2892.

CONCLUSION

Appellant is not entitled to a lien for storage during the time Appellant held the aircraft for the Sheriff. Appellant's claim is against the Sheriff, not the property.

Appellant is not entitled to a lien for storage during the time the aircraft was not under attachment, as well as for the time it was under attachment, as Appellant was holding the property under a repair lien and is prohibited by C.C. Sec. 2892 from claiming such a storage lien.

Dated, Reno, Nevada,

February 26, 1968.

Respectfully submitted,

STEWART & HORTON,

By RICHARD W. HORTON,

Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD W. HORTON.

N O. 2 2 3 2 0

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PEMBERTON,

Appellant,

vs.

JAMES A. DAVIS,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FILED

MAR 12 1968

WM. B. LUCK, CLERK

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N O. 2 2 3 2 0
IN THE UNITED STATES COURT OF APPEALS
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Appellee.

APPELLANT'S REPLY BRIEF

ARGUMENT

The Appellee's Answering Brief quotes extensively from the opinion of the District Judge in this matter and raises only one other contention, that is, that if Appellant, Pemberton, is entitled to any amount for storage charges, that amount is limited to a maximum of Two Hundred Fifty Dollars (\$250.00) by reason of the provisions of Section 1208.62 of the Code of Civil Procedure. In Pemberton's Opening Brief, we submitted arguments against the position taken by the District Judge which eliminated any allowance for storage of the aircraft, and we will not repeat the arguments there made. This Reply Brief will be limited solely to the effect of Section 1208.62,

I

SECTION 1208.62, CALIFORNIA CODE OF
CIVIL PROCEDURE DOES NOT LIMIT THE
LIEN CLAIM BY APPELLANT IN THIS PRO-
CEEDING.

As was previously stated, we know of no reported decisions in California construing Section 1208.61 of the California Code of Civil Procedure, the section which does grant lien rights against aircraft. The language of that Section is practically identical with the language of Section 3068(a), California Civil Code and the interpretations given to California Civil Code, Section 3068 would be determinative here; in construing a statute, other statutes in pari materia may be studied and reference can well be made to any other codes for clarification (In Re Porterfield, 28 Cal.2d 91, 168 P.2d 706; People v. Vasser, 207 Cal. App.2d 318, 24 Cal. Rptr. 481).

The statute granting the lien for repairs to an aircraft grants a lien dependent upon possession for the compensation to which the lien claimant is legally entitled, " . . . for making repairs, or performing labor upon and furnishing supplies or materials for, and for the storage, repair or safekeeping of any aircraft . . ." (Code of Civil Procedure, Section 1208.61); the statute limiting the lien rights, Section 1208.62 of the Code of Civil Procedure states:

"That portion of such lien in excess of two hundred

fifty dollars (\$250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work or services are performed. . . ."

It is a principle of statutory construction that every sentence, phrase or word should be given effect (Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449). We submit that there is a distinction here in the language used by the legislators and that the limitation which appears in Section 1208.62, Code of Civil Procedure, that is, a limitation of \$250.00 for work or services rendered or performed, relates to that portion of Section 1208.61, California Code of Civil Procedure which grants the lien for making repairs or performing labor upon and furnishing supplies or materials for any aircraft. It is of some significance that the portion of Section 1208.61, California Code of Civil Procedure which grants a lien for storage, is stated as a separate clause in the statute, separated from the portion of the statute granting the lien for repairs or labor by the conjunction "and".

Additional weight for this interpretation exists when the language of Section 3068(b) of the California Civil Code is considered.

That Section reads in its entirety as follows:

"§3068(b): That portion of the lien in excess of two hundred dollars (\$200), for any work or services rendered or performed at the request of any person other than the holder of the legal title, is invalid, unless prior to commencing any such work or service the person claiming the lien gives actual notice in writing either by personal service or by registered letter addressed to the legal owner named in the registration certificate, and the consent of the holder of the legal title is obtained before any such work or services are performed. If any portion of a lien includes charges for the care, storage or safekeeping of, or for the rental of trailer parking space for a vehicle for a period in excess of 60 days, the portion of the lien which accrued after the expiration of such period is invalid unless the provisions of Section 10650(1) and 10652 of the Vehicle Code have been complied with by the holder of the lien."

A comparison of the respective lien statutes will show that the statute granting the liens with respect to aircraft (Code of Civil Procedure, Section 1208.61), is almost word for word the same as Civil Code, Section 2068(a) which grants a lien upon vehicles, and the section limiting the lien on aircraft (Code of Civil Procedure, Section 1208.62), is practically identical with the statute limiting

the lien on motor vehicles, the section just quoted above. The language used in each is the same, that is, the clause "work or services rendered or performed at the request of any person other than the holder of the legal title" (emphasis added). Then, Section 3068(b) goes on to impose an entirely different restriction for any portion of the claimed lien which covered services for care, storage or safekeeping of the vehicle. This limitation is not a monetary one but is based upon a period of storage of 60 days and it is of some significance to note that this limitation to 60 days storage is imposed only if the lien claimant has failed to comply with two sections of the Vehicle Code which require the lien claimant to maintain records of vehicle stored and to make a report to the sheriff's office or police department when a vehicle is stored for a period of time in excess of 30 days and the owner is unknown. No notice to a legal owner is required and it is apparent that the legislature treated the lien for storage on an entirely different basis than the lien for labor or materials.

We respectfully submit that consistent with the doctrine of statutory construction noted above, the intent of the legislators appears to have been to impose a limitation on the lien claimed for repair work or materials, with such limitation to be a monetary one, but that no such limitation exists with reference to any lien for storage. The attitude of the courts towards the sections limiting lien rights can perhaps be shown by reference to such decisions as Brown v. J. E. French Co., 253 Cal. App. 2d ___, 242 A. C. A. 70, 60 Cal. Rptr. 646, which was a direct holding that the provisions of

Section 3068(b) of the Civil Code which limited the amount of the lien, inured only to the benefit of the legal owner of the vehicle and held that the registered owner who had brought the car in for repairs must pay the entire repair bill even though the lien claimant had failed to comply with the notice provisions of Section 3068(b) of the Civil Code.

Accordingly, if the storage was properly authorized by the Sheriff of Kern County and if, as we contend in our Opening Brief, the Sheriff had the right to subject the aircraft to a lien for storage, then there is no limitation in amount such as is presently urged by Appellee, Davis.

CONCLUSION

It is respectfully submitted that the Appellant, Pemberton, is entitled to a lien for storage of the aircraft, such storage having been properly authorized and ordered by the Kern County Sheriff. Since the reasonable value of the storage is not in issue, then the order of the District Court should be reversed and the claim of Pemberton should be allowed in its entirety.

Respectfully submitted,

DEADRICH, BATES & LUND

By: KENNETH H. BATES

Attorneys for Appellant,
Roy Pemberton

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Kenneth H. Bates
KENNETH H. BATES

BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

NO. 22322 ✓

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON,
his next friend, and PRISCILLA J. JACOBSON, by MILDRED J.
JACOBSON, her next friend,

Appellants.

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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FILED

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STATEMENT

JURISDICTION

All plaintiffs are citizens of the State of Montana; defendant is a corporation foreign to the State of Montana, with principal place of business in the State of Colorado. The amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs. R.A.223. The district court had jurisdiction by virtue of diversity of citizenship and amount in controversy. Art.III,Sec.2, Para.1,Const. of the U.S.; Title 28 U.S.C.,Sec.1332 (a) (1). See R.A.1,47 for pleadings.

This court now has jurisdiction by virtue of Title 28 U.S.C., Sec.1291, timely and appropriate notice of appeal having been duly given and filed. R.A.288, 235, 287.

STATEMENT OF THE CASE

DeRay Jacobson was killed October 1, 1964, when his head was crushed as the result of a piece of defendant's prestressed concrete strand breaking at a load at least 5,750 pounds less than the strength to which it is admittedly warranted. DeRay Jacobson's widow, son and daughter bring this action for damages sustained by reason of his death.

The steel strand which failed was 7/16 inch diameter Type 270 K seven-wire strand manufactured and sold by defendant, C.F. & I and was expressly warranted to have a "minimum ultimate strength" of 31,000 pounds, and to be capable of safely sustaining such load or stress. Ex. 1, 19; R.A.248-250, 48-59.

C.F.& I.'s Type 270 K strand is a highly specialized elastic cable-like strand made of seven uncoated, stress relieved, cold drawn, high tensile strength steel wires used in the manufacture of prestressed concrete objects. It is the subject of a Bulletin PC 955, prepared and distributed by C.F.& I. to the makers of prestressed concrete products, including United Prestress, Inc., DeRay Jacobson's employer. This bulletin is in evidence as Ex. 1, and is reproduced in the Record on Appeal. (R.A. 248-250) It was ". . . prepared to provide complete information on physical properties of the strand." Ex. 1. It points out that 270 K strand, ". . . an important engineering break through recently announced by C.F.& I. - Roebling . . . " has approximately 15 per cent greater strength than strand previously available. For 7/16 diameter strand the bulletin warrants in

Table I:

Breaking Strength of Strand Min. 1b. 31,000

Table II referred to in the DESIGN LOAD paragraph warrants the 270 K strand to have:

Minimum Ultimate Strength 31,000#

To be used in prestressed concrete manufacture the strand must be placed in wedge grips, held by them and tensioned.

Ex. 1 assures the reader that:

Thorough testing has been conducted, using Type 270 K strand in wedge grips of the type employed in casting beds.

The failing hold down strand was used in a hold down device utilizing standard wedge grips. Ex. 23.

The copy of Ex. 1 in evidence contains personal handwritten notations of Floyd Swenson, the engineer at United Prestress, Inc. at the time DeRay Jacobson was killed. It was Swenson's sole source of information concerning the specifications and physical properties of 270 K strand. Tr. 64, 65, 85. Using the C.F. & I. bulletin as his guide, he designed the prestressed sections of a meat packing plant, including the two 90-foot single "T" roof beams on which DeRay Jacobson was killed. Swenson's work included calculation of the force, 22,500 pounds, to be imposed upon the hold down strand that failed. Ex. 7 b; Tr. 82, 151. In imposing the force on the 270 K hold down strand Swenson took C.F. & I. at its word. The bulletin, he testified, stated that the strand could be loaded to at least 31,000 pounds before failure. Tr. 82.

The load which Swenson calculated taking C.F. & I.'s claims for fact, was less than three-fourths of its claimed minimum breaking strength. Nothing he had ever heard or read led him to believe that this loading was unsafe. Tr. 64, 65, 82, 83, 85. He had after all allowed four and one-quarter tons of leeway.

To the force calculated by Swenson there must be added an allowance for the effects of friction in the prestressing system. This was done by plaintiffs' expert Dr. Arthur Anderson. He conservatively assumed 100% friction and full tensioning of the

strand and calculated the load on the strand at failure at not more than 23,250 pounds. Tr. 147 to 152. The defendant's expert thought it might be "two kips" (2,000 pounds) higher, which would give a load of 25,250 pounds. Tr. 440. All were agreed that the C.F. & I. strand failed at less than 31,000 pounds and the trial court so found. R.A. 228.

DeRay Jacobson, to the time of his death, was the foreman of a crew which made such things as roof beams and other members of prestressed concrete. His work was in the fabrication of these items, directing his crew in using 270 K strand, other reinforcing steel and concrete to manufacture the beams. He and his crew worked and took their direction from plans and measurements furnished to them by the design technician, Floyd Swenson. R.A. 231.

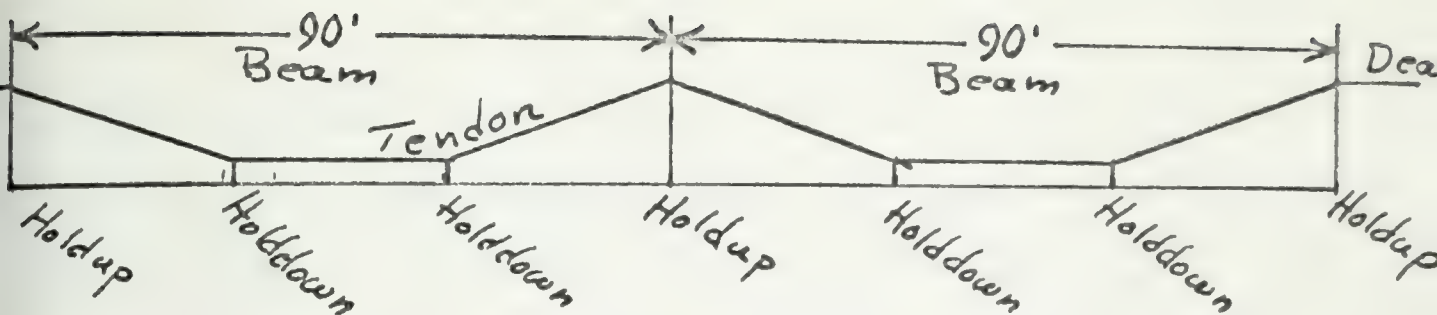
Before Mr. Jacobson and his crew could do the tensioning, design engineer Floyd Swenson had to figure out what was required by way of number of strands, pattern, and force to be applied. The designer takes into account the requirements of the building, the capacity of the strand, and the plant available to fabricate the beam. The building's requirements he determines from the architect's plans and specifications. The capacity of the strand he takes from the technical literature published by the manufacturer. The available plant he knows because he works there.

A prestressed beam is built in a "casting bed" by tensioning 270 K strand with heavy hydraulic equipment, then forcing

the tensioned strand into a downward bowed pattern for the purpose of later providing lifting force at the middle of the completed beam. After the strand has been fully tensioned and deflected, concrete is poured around it and retained until dry by a form in the shape of the prestressed concrete member desired. It is the tensioning operation prior to pouring concrete with which this case is concerned.

The casting bed used is slightly longer than 230 feet and was being used to make two 90-foot single T roof beams end to end. One end of the casting bed is firmly anchored in a fixed position. This is termed the dead end. The opposite end is mounted on hydraulic equipment and is movable. It is called the live end. Using the hydraulic machinery the live end is moved away from the dead end. This lengthens and tensions the horizontal prestressed concrete strands ("tendons") which are affixed to both the dead end and the live end.

When being used to cast the two 90-foot single T's the bed had three hold up points; one at the dead end where the strands were securely anchored, one in the middle through which the strands passed, and one near the live end. The hold up point in the middle was the separation between the two beams. The hold up points at the beam ends did not move, nor did the one in the middle. See sketch.



At the time of DeRay Jacobson's death 22 pieces of strand had been anchored at the dead end, threaded through the middle hold up point, and anchored at the live end. These strands were placed at pre-calculated levels in the casting bed at varying elevations above the floor of the bed. R.A. 224. Ex. 7 a.

The strand is tensioned by stretching the strand a pre-determined distance to achieve the pounds of stress required to do whatever job is to be done by the completed beam. The strand is first stretched horizontally by moving the live end a pre-determined distance, then deflected downward another pre-determined distance through the use of the hydraulic hold down device. 270 K strand such as is used in the horizontal tendons is also used as hold down strand to hold the horizontal tendons in the position to which they are deflected. The tendons and hold downs are under the greatest load when fully stretched to final position. The load on both horizontal strands and strands used to hold down the horizontal strands is related to the pre-determined distance that the strand is stretched or elongated. See Ex. 18, showing the relation between load and stretch.

Strand failures during the tensioning process are extremely hazardous. R.A. 231. "Lethal" is the term preferred by the

strand's developer, Mr. H. Kent Preston of C.F. & I. In his book, Practical Prestressed Concrete, McGraw-Hill Book Co., New York, Toronto, London, 1960 (Ex. 12) he states:

In addition to the normal precautions required on any construction work, it must be remembered that a prestressed concrete tendon under tension as high as 175,000 p.s.i. contains a tremendous amount of energy. The tendon and/or any equipment connected with it can whip across working areas with lethal results if its pent up energy is suddenly released by some type of equipment failure.

Mr. Preston is the head of the sales department at C.F. & I. He edited and supervised the writing of C.F. & I. Bulletin PC 955, Ex. 1. (Ex. 11, p. 60)

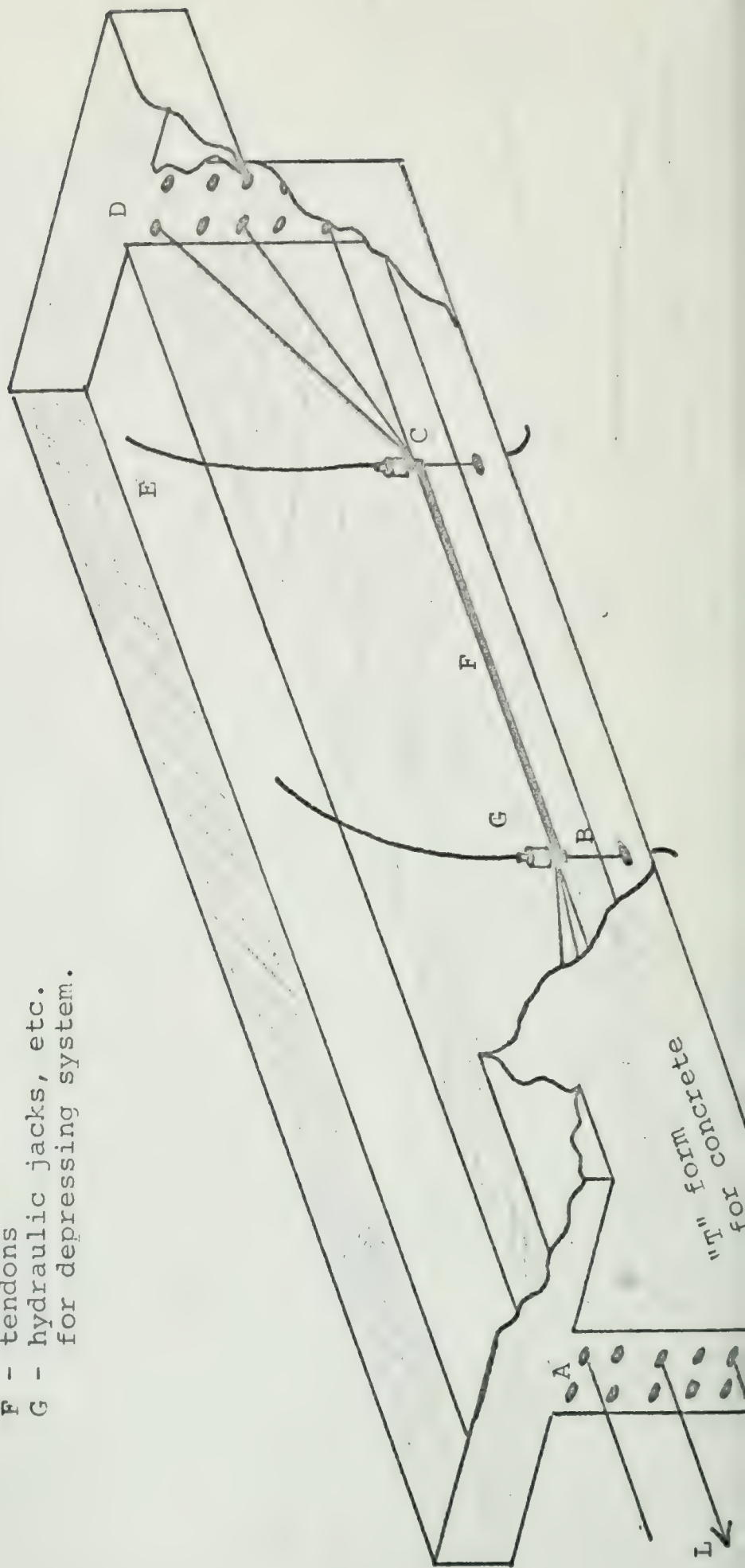
Those lethal forces were present in the 90-foot "T" beams being constructed when DeRay Jacobson was killed. These beams were part of a series of 90-foot T shape beams to be set edge to edge to form a roof for a meat packing plant. To span this distance the beams were designed with 22 tendons running the length of the beam. The 22 tendons were deflected downward at two hold down points within each beam. When in final position each of the 22 horizontal strands was tensioned to 21,700 pounds, or 70% of the minimum ultimate strength of the strand, the exact tension recommended by C.F. & I. in Ex. 1 for the most efficient and optimum performance in the completed beam. See Tr. 142, 143.

If fully deflected downward the total force on the horizontal tendons would have been $22 \times 21,700$ pounds, or a total of 477,000 pounds. In order to hold down the horizontal tendons under that

Cutaway view of interior arrangement of casting bed - strands are fully depressed. Scale is exaggerated.

Legend:

- L - live end
- A - hold up point
- B - hold down point
- C - hold down point
- D - hold up point
- E - hold down strand
- F - tendons
- G - hydraulic jacks, etc. for depressing system.



force, it was necessary to impose 22,500 pounds on the hold down strands at each hold down point. Ex. 7 a, 7 b; Tr. 151.

To apply the deflecting or depressing force after the lateral tension is set requires that two shorter pieces of 270 K strand be anchored at the bottom of the casting bed for each beam. On these two strands a set of hardware is placed, including a hydraulic jack. Ex. 23. The expansion of the jack acting with the hold down hardware forces the horizontal tendons down to the desired position. When the desired position is reached, the expendable part of the hardware, a standard wedge grip locks in place. The jack is removed and the concrete is poured. After the concrete hardens the forms are taken away and the ends of the strand trimmed off. This fixes for all time the tension and the pattern of the strand and the strand imparts its strength to the beam. The beam is then ready to be lifted off the casting bed, taken away for use, and the process starts over again.

Our illustration on the facing page shows in simplified fashion the position of the strand in each 90-foot T beam at the time the stressing is completed, but before the reusable portion of the hardware is removed and the concrete poured. In the illustration the live end and the dead end of the casting bed would be beyond the ends of the beam. A and D are hold up points, plates through which the horizontal tendons are threaded. B and C are hold down points utilizing the same 270 K strand.

On the date of Jacobson's death he and his crew were

utilizing the 230 foot casting bed to set up two of the 90-foot "T" beams end to end at the same time, and were using a common set of 22 horizontal tendons through both beams. Since each beam had two hold down points there were a total of four hold down points in the two beams. A common hold up point between the two beams was used. DeRay Jacobson and his crew anchored the 22 tendons at the dead end of the casting bed and ran them through the casting bed threading through the hold ups at varying elevations from the floor of the bed. Prior to anchoring them at the live end a small arbitrary amount of tension was placed upon them to straighten the strands. Then the individual strands were backed off in a measured amount. This was done by marking the individual strands at varying distances from the live end of the bed and allowing the strands to slip back to the marks. The straightening tension was then released. This was a necessary step because all strands in the T beam are forced in the deflection process a different distance to a point near the floor of the bed. (See illustration page 84). In the end product it is desired that each horizontal strand have an equal amount of stress, 21,700 pounds, and since the strands at greater distances from the floor will be stretched further than those closer to the floor the higher strands at the start of the deflection process must be longer from anchor to anchor than the lower ones.

The design in the instant case, as do most prestressed concrete designs, provided for two of the horizontal strands to

run straight through the beam and they were located in a low position so as not to be deflected with the other strands. Thus the desired tension was achieved on the straight strands where the live end was moved away from the dead end, and they were not affected by the deflection process. R.A. 224-225.

After adjusting the varying lengths of the individual horizontal tendons, they were gripped by the same standard wedge grips used in the hold down device and the entire live end was moved to a pre-calculated distance to produce an amount of tension which, when coupled with the tension created by the harping process would produce the total amount of tension in all of the strands which was called for by the design of the single T's. R.A. 225.

In the prestressing operation neither DeRay Jacobson nor his crew worked with pounds of force as such. That is the province of Floyd Swenson, the design engineer. On the casting bed things are done by measurement. To get the required force on the tendon the designer calculates the distance which the strand must be stretched. The same applies to the hold down force, the designer determined the number of inches of deflection or depression which would bring the tension to the desired level. This information was given to the crew foreman, DeRay Jacobson, and he used it to set up the job. Tr. 209-214. This system of measurement by elongation is the preferred way to accurately set up the tension and determine the load on the strand. (Preston's deposition, Ex. 11, p. 43).

In this case it was intended to depress the horizontal strands to a point near the floor of the bed at two hold down places in each of the 90-foot T's. At the start of the harping process the 22 horizontal tendons referred to above were stretched longitudinally through the length of the casting bed, and as noted each pair of longitudinal strands bore a different amount of tension than each other pair, depending upon their relative position from the floor of the casting bed.

DeRay Jacobson and his crew then applied a vertical force to these horizontal tendons at two points in each T to force all of the strands two points close to the floor of the casting bed. The vertical force was applied by two hydraulic rams which were operated from the top of the casting bed. The rams were operated together so that at any given time the points at which the strands were being affected by each ram would be the same distance from the floor of the casting bed. The rams had a five inch stroke so that after the strands were depressed five inches it was necessary to hold the strands in position while the piston of the ram was pulled back preparatory to a new thrust.

Part of the hold down device consisted of a saddle which is an inverted U made of steel plate, which gathers the strands together. Hold down strands were anchored to the beam plate at the floor of the casting bed by means of a supreme chuck, a standard wedge grip, and was threaded through the bottom of the form, through the saddle, through the bottom into a steel spacer

box open on one side, through another supreme chuck, out through the top of the box, through the ram and then through another chuck. For clarification see Ex. 23, a photo of the rig.

Through the interaction of these parts the horizontal tendons are deflected in increments down the hold down 270 K strands.

R.A. 225, 226.

The 22 horizontal tendons were fully deflected in the first of the single T beams by DeRay Jacobson's crew without incident. The crew was in the process of deflecting the 22 horizontal tendons at the remaining two hold down points in the second T beam. The horizontal tendon strands had reached a point within an inch or two of the floor of the casting bed when the workmen heard a noise accompanied by a slight movement. They shut off the jacks and investigated but found nothing out of the ordinary. They started the jacks for additional depression and heard another noise accompanied by slight movement. Tr. 218, 244, 247. The crew could not tell from the noise, the movement or observation just what had happened in the casting bed.

DeRay Jacobson, the foreman, was called and told what had happened. Jacobson sent a man under the bed to inspect the situation there. This inspection revealed nothing amiss. Jacobson and his men could see nothing out of the ordinary looking into the casting bed from the top. Jacobson then ordered the crew to turn the jack on and turn it off. Tr. 231, 232. The jack was turned on briefly "and everything seemed all right".



Tr. 248. Nothing happened. The jack was again turned on, the hold down strand broke, and the whole thing "blew up".

The tension on the 22 horizontal tendons was instantly released and they flew upward as would a bow string. The loosed pentup energy in the system threw the jacks and hold down iron and steel high in the air. DeRay Jacobson was hit by some of the flying iron and steel and received the injuries from which he died. R.A. 225, 227; Tr. 248, 249.

DeRay Jacobson was not contributorily negligent. R.A. 232, 234. (Finding XVI, Conclusions of Law VIII).

Subsequent investigation revealed that the initial failure of the strand occurred at the point where the uppermost wedge grip met the milled upper surface of the portable hydraulic jack used to furnish the depressing force. See Ex. 23 and Ex. 4, p. 6. When the first hold down strand failed, the entire load was violently thrown onto the other hold down strand which was jerked in two. Thus all of the depressed tendons were released to fly up, hurl hardware in all directions and oscillate up and down with tremendous speed and force.

At the point of failure there were nicks on three of the wires spaced uniformly around the strand from the wedge grips. Tr. 356-362, 408. There is of course no way that 270 K strand can be utilized without the "wedge grips of the type employed in casting beds" to which C.F. & I.'s literature refers. Ex. 1; Tr. The nicking is immaterial in view of the fact that C.F. & I.

stated warranties of 31,000 pound minimum ultimate strength and minimum breaking strength in the context of use in the manufacture of prestressed concrete objects and with wedge grips of the type normally employed. Ex. 1. After all this is what C.F. & I. makes it for.

Nevertheless nicking does not account for the failure of the strand at the 23,250 pounds of stress or less imposed upon it at failure according to plaintiffs' expert Dr. Arthur Anderson. (Tr. 158, 172), or even at the load of 25,250 pounds which the defendant's expert Mr. Janney thought possible. The defendant's metallurgical expert, Mr. Teleshak, testified at some length concerning the grip marks from the wedge grips which were necessarily used in the employment of the strand. According to Mr. Teleshak, at the point of initial failure three wires of the seven wire strand, located at approximately uniform 120 degree intervals exhibited nicks from the wedge grip. Tr. 256-362, 408. In an original report prepared for C.F. & I. (Ex. 4) Mr. Teleshak concluded that the load carrying strength of the three nicked wires was reduced about 10%. Tr. 379. Subsequently, after communication with Mr. Preston of C.F. & I., he wrote a "supplemental" report (Ex. 6), indicating that the ~~nicks~~ affected the overall load carrying capacity of the strand 10%, as opposed to 10% of the three nicked wires. Tr. 382-382. If Mr. Teleshak's conclusion is accepted from his first report, the nicking reduced the load carrying capacity of the 270 K strand to approximately 29,175

pounds. Either of these figures are well above the amount of force which was actually imposed upon the strand at the time it failed. The nicking does not account for the failure. Tr. 369-379, 397-402.

The trial court found that C.F. & I. knew that its 270 K strand would be used for hold down devices, although the strand was not furnished specifically for that use; that 270 K strand was to be employed under heavy tension and prestressing operations; that strand failures are extremely hazardous; that a single strand of 270 K should not be used in hold down devices where tensions of more than 15,500 pounds are developed; and that defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device. R.A. 231; Ex. 1. In reliance on that inadequate literature Floyd Swenson designed in the hold down load that proved fatal to DeRay Jacobson.

No one has ever asserted that the strand even approached the 31,000 pound minimum breaking strength claimed for it before it failed. No one has ever asserted that Floyd Swenson knew that the load which he designed was not safe. No one warned Mr. Swenson or anyone else at United Prestress of any special hazard involved in using the strand to retain the hold down device. C.F. & I. was familiar with the United Prestress system, having observed the hold down technique through its agents. No one from C.F. & I. ever criticized the system or apparatus used by United Prestress for depressing the strand.

The case was tried to the District Court sitting without a jury. On the theory of negligence the trial court found that another engineer at United Prestress, Albert Young, knew that two strands, or a strand larger than 7/16", should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. The trial court held that the knowledge of Mr. Young, an engineer in no way connected with DeRay Jacobson's death, "insulated" C.F. & I. from liability for failure to warn of the known limitations of the strand.

With respect to express warranties the trial court held that the strong unequivocal language of Ex. 1 representing 270 K strand to have a minimum ultimate strength of 31,000 pounds did not constitute an express warranty. No finding was made concerning whether C.F. & I.'s statement that the strand had a minimum breaking strength of 31,000 pounds was an express warranty.

R.A. 231-233.

The trial court made no findings of fact or conclusions of law with respect to the plaintiffs' theories of liability for breach of implied warranties and strict liability in tort, as declared by Sec. 402 A, Restatement of the Law Torts, Second.

In accordance with the court's Findings of Fact and Conclusions of Law, judgment was entered denying all relief to DeRay Jacobson's family.

By timely motion the Jacobsons moved the court for an order

amending its Findings of Fact and Conclusions of Law and amending the judgment or in the alternative granting the plaintiffs a new trial on all or part of the issues involved in the action. The trial court denied the motions. The Jacobsons filed timely notice of appeal from the judgment of the District Court entered against them and the order of the District Court denying their motions under Rules 52, 59 and 60, Federal Rules of Civil Procedure.

R.A. 288.

SPECIFICATIONS OF ERROR

I.

The District Court Finding of Fact XIII and Conclusions of Law V, VI and VII are clearly in error in invoking the knowledge of the wrong man, Mr. Young, to relieve C. F. & I. of liability.

- (a) Albert Young had nothing to do with DeRay Jacobson's death.
- (b) The District Court Finding of Fact XIV established defendant as at least a joint tort feasor liable to the plaintiffs under Montana law.
- (c) Defendant had the burden to prove independent intervening cause, but did not do so.
- (d) Mr. Swenson decided the force to be put upon the hold down device, a piece of equipment with which he was fully familiar.

II.

The District Court erred in its application of the law of "duty to warn" in Conclusions of Law V and VI.

- (a) The duty ran to Mr. Jacobson.
- (b) The duty required the warning to be given to Mr. Swenson so that he could design within safe limits.
- (c) The risk of ingnorance of the designer must be imposed upon C. F. & I., not upon Mr. Jacobson.

III.

The District Court erred in failing to hold defendant liable for breach of express warranties stated in its sales literature and admitted in its pleadings.

- (a) Finding of Fact XII and Conclusion of Law III wherein the District Court found defendant did not warrant 270 K strand would withstand a tension of 31,000 pounds when employed as hold down strand by United Prestress in its prestressing operation are unsupported by the evidence, contrary to the evidence and clearly erroneous.

IV.

The District Court erred in failing to rule upon plaintiffs' theories of breach of implied warranties and strict liability in tort, and in failing to hold defendant liable for breach of implied warranties or under the law of strict liability in tort.

V.

The District Court's failure to grant plaintiffs' Motion for New Trial on all or part of the issues was an abuse of discretion.

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ARGUMENT

THE TRIAL COURT ERRED IN HOLDING C.F.& I. "INSULATED" FROM LIABILITY BY REASON OF KNOWLEDGE ATTRIBUTED TO ALBERT YOUNG, AN ENGINEER IN NO WAY CONNECTED WITH THE DEATH OF DeRAY JACOBSON.

(1) The record clearly establishes that Floyd Swenson was the only engineer involved in the death of DeRay Jacobson and that Albert Young had nothing to do with this tragedy.

At the time of DeRay Jacobson's death, Floyd Swenson was employed by United Prestress, Inc. as an engineer. He and he alone engineered and designed the prestressed sections for the Pierce Packing Company project, on which DeRay Jacobson was working when killed by the failure of C.F.& I. strand. Tr. 63,67. Swenson calculated the force to be imposed upon the hold down strands in the hold down device in use at United Prestress. Ex. 7 b; Tr. 82, 151. In doing so he relied exclusively on C.F.& I. Bulletin PC 955 (Ex. 1) for the specifications and physical properties of 270 K strand. It was the only information available to him when he designed the prestressed members and calculated the hold down forces. Tr. 64, 65.

Floyd Swenson is no longer with DeRay Jacobson's employer United Prestress, Inc. Albert Young who is presently the engineer and chief technical person at United Prestress, Inc. had absolutely nothing to do with the death of DeRay Jacobson. At the time of Jacobson's death, Young was merely a production coordinator who took care of the office records and entered into sales and engineering only in part and to a small degree. Tr. 5. Concerning the project involved in Jacobson's death Young testified:

Q: Mr. Young, were you the engineer in charge of the job on which Mr. Jacobson was killed?

A: No, I wasn't.

No one testified to the contrary and in the trial court it never occurred to C.F. & I. to urge that Young had anything to do with DeRay Jacobson's death or the engineering connected with it.

The trial court however erroneously described Young as the superintendent of the plant and the chief technician" and ascribed to him the knowledge that "two strands, or a strand larger than 7/16" should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. The court found that C.F. & I.'s literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold down device, but by reason of the knowledge attributed to Young such failure did not make C.F. & I. liable in this case, citing Hopkins v.

E. I. DuPont deNemours & Co., 3 Cir 1954, 212 F.2d 623, Cert.Den. 48 US 872. The confusion of Young with Swenson, the only engineer having anything to do with the project, renders the Jacobson family victims of a substantial injustice.

It was clearly erroneous to apply Hopkins v. E. I. DuPont deNemours & Co. to the facts of this case. In Hopkins the plaintiff was denied relief because the foreman in charge of drilling holes and placing dynamite had been informed that drilling in hard rock produced sufficient heat to cause premature explosion of dynamite and knew that certain temperatures would

be too hot for the safe handling of a blasting charge.

Assuming that Albert Young had knowledge of the limitations of C.F. & I.'s product which C.F. & I. neglected to publish, the Hopkins case would be similar only if Young did the engineering connected with the death of DeRay Jacobson. But Floyd Swenson occupies the position of the foreman in the Hopkins case; and the record is clear that Floyd Swenson knew nothing of the limitations of the 270 K strand beyond those set forth in the overstated literature of the defendant which the trial court found did not adequately warn of those limitations.

Swenson's lack of knowledge is adequately demonstrated by the record. He testified:

Q: I show you what have been received in evidence as plaintiffs' exhibits 1 and 2 and ask you to look at those, please.

Do you recognize either of these exhibits?

A: I recognize No. 1.

Q: Would you tell us what that is, please?

A: This gives the specifications and physical properties of 270 K strand.

Q: Was that available to you when you were working for the United Prestress on October 1, 1964 and prior thereto?

A: Yes sir.

Q: Was the other exhibit, Plaintiffs' 2, available to you at that time?

A: I don't recognize this one.

Q: I notice here there are some pencil markings and things inside Plaintiffs' No. 1. Do you recognize what they are, not what they mean?

A: Yes sir.

Q: And what are they?

A: They are numbers I used in designing.

Q: That is your handwriting?

A: Yes sir.

Q: Then is this Plaintiffs' Exhibit No. 1, was that a source of your information concerning the strength characteristics of Colorado Fuel and Iron Type 270 K strand, prestress concrete strand, 7/16ths inch diameter?

A: Yes.

Q: Did you have any other information from Colorado Fuel and Iron Company concerning the strength characteristics of the strand, other than this material?

A: Not that I recall.
Tr. 64-65

* * *

Q: So this was your first employment, was it not, in the fabrication of prestress concrete members, is that correct?

A: Right.

Q: And prior to October 1, 1965, had you ever designed a member exactly like the one you were designing?

A: Would you define 'exactly'?

Q: Well - -

A: - - exactly the same dimensions?

Q: Exactly the same dimensions.

A: No sir.

Q: Same length in the leg and depth of a leg and so forth?

A: No sir.

Q: Had you ever designed an identical member?

A: Within my interpretation of identical, I think I could say yes.

Q: Well, let's see if our interpretations are similar. Same dimensions as this one, with the same number of strands and with the same depths in the leg.

A: No sir, not with all three of those combined.

Q: As a matter of fact, then, this was the first such member that you had designed, isn't that right?

A: Yes sir.
Tr. 79-80.

* * *

A: The ultimate capacity of the strand is the maximum load we can put on the strand before failure.

Q: And that's 31,000 pounds?

A: 31,000 minimum, correct.

Q: And the recommended initial tension, which is the total tension which you should have on this thing is recommended at 70% of its ultimate strength, is it not?

A: It doesn't say recommended.

Q: Do you understand that it's not recommended to be used at 70% of its ultimate strength?

A: No sir, I don't.

Q: Would you use it now at more than 70% of its ultimate strength?

A: If I didn't feel it was dangerous, yes.

Q: Do you feel now it would be dangerous to use 70% -- more than 70% of its ultimate strength?

A: I didn't feel that the extra load was significant.

Q: Did you design the hold down device in this particular case?

A: No sir.

Q: Were you very well familiar with the hold down device?

A: Quite well.
Tr. 82-83

Q: Did you ever seek any other information with respect to 270 K prestress concrete strand from C.F. & I., or any other company?

A: No sir.

Q: You relied solely upon this brochure, is that correct?

A: Correct.

Q: Do you know whether there is a substantial amount of literature written about 270 K strand or other types of prestress concrete strand?

A: By brand name?

Q: Not necessarily by brand name but I will start first with a brand name.

A: I don't know of anything else that would mention C.F. & I. strand, no. Tr. 85

* * *

Q: During the period of time that you were employed by United Prestress Concrete, did you have any other hold down strand breaking?

A: Not that I recall.
Tr. 86 (Emphasis added)

Mr. Swenson is thus proved to have been without the knowledge of safety limits which might insulate C.F. & I. As the trial court found, the safety information is not made available in defendant's exaggerated literature. (R.A. 232) An example of general literature is an authoritative book on the subject of strand by Mr. Preston (of C.F. & I.) the developer of 270 K strand which describes its dangerous character but is silent on safety factors

r load limitations. Ex. 12. It is not at all surprising
herefore that Swenson was without knowledge of safety limits
concerning C.F. & I.'s 270 K strand -- "an engineering breakthrough",
x. 1.

On the facts of this case Montesano v. Patton Scaffolding
Company, WD Pa., 1962, 213 F.Supp. 141 is more nearly applicable
than the Hopkins decision relied on by the trial court. In
Montesano the plaintiffs' decedent was killed when a bracket
supporting a scaffolding gave way. The bracket was manufactured
by the defendant and rented by it to Cost Brothers, the employer
of plaintiffs' decedent. The defendant urged that Cost Brothers
knew of the bracket's dangerous design and by reason thereof
the defendant was "insulated" from liability for the death
of the plaintiffs' decedent. The court disposed of this
contention in the following language:

The defendant contends that merely giving the knowledge
to Cost or Cost's actual knowledge would be sufficient
to insulate it from liability in this case. The effec-
tive warning given to third persons is discussed in
Comment (1) to the Restatement of the Law of Torts,
Section 388. The comments contained therein clearly
show that a supplier of chattels where the risk of harm
to the actual user of the chattel, Montesano in this case,
is great then the supplier is required to go further than
merely tell the lessee of the chattel such as Cost of the
dangerous character of the article. If he fails to exercise
reasonable care under the circumstances, if the information
is not brought home to those whom the supplier expects to
use the chattel, he is subject to liability.
(Emphasis added). 213 F.Supp. at 143.

Lloyd Swenson and DeRay Jacobson were the users of C.F. & I.'s

product -- not Albert Young. It was the design engineer, Floyd Swenson, along with DeRay Jacobson, who was expected to use the chattel and to whom under the circumstances of this case the warning should have been given if C.F. & I. is to be insulated from liability.

The error urged here was pointed out to the trial court on motion for a new trial. (See R.A.239-286). The trial court responded with this language in its order denying the most trial motion:

Plaintiffs, in their arguments, expressed the idea that Swenson designed the members in question and that it is to his knowledge that the court should look rather than to the knowledge of the witness Young. Swenson did design the member in question, but the record does not indicate that he had anything to do with the design or use of the hold down device which failed. It was not the design of the member, but rather the design and use of the hold down device that caused the trouble. The hold down device was one which had been used long prior to the employment of Swenson. (Emphasis added). R.A.287.

The distinction made by the trial court between design of the member and design and use of the hold down device is erroneous and contrary to the record.

Swenson did his designing with reference to the prestressing equipment in use at United Prestress -- he was not away in an ivory tower making abstract designs, but was a part and parcel of the United Prestress construction process. While he did not actually design the hold down device in use he was in fact "quite well familiar with the hold down device". Tr. 83. Swenson's design work was not limited to forming the members but included

calculation of forces to be imposed on the hold down strands
on the hold down device with which he testified he was "quite
familiar". He did in fact design, calculate and order imposed
upon the hold down strands the force that was placed upon them
in the prestressing operation. Ex. 7 b; Tr. 82,151. Swenson's
design and calculations were based on information he obtained
from the C.F. & I. bulletin. Ex. 1. These forces, so calculated
were imposed upon the actual piece of C.F. & I. strand which
failed and killed Jacobson.

Swenson was aware of the forces he was imposing upon the
hold down strands. Because of the representations contained in
the C.F. & I. literature extolling the strength of the strand
he "didn't feel that the extra load was significant". Tr.83

In contrast Albert Young had absolutely nothing to do
with the use of the hold down device when Jacobson was killed.
He was wholly unconnected with design, calculation or imposition
of the forces involved on the hold down strands which failed
and killed DeRay Jacobson. Further, even at the time of trial
Young was not familiar with some details of the hold down device. See
Tr.49

The trial court's confusion of Albert Young with the role
played by Floyd Swenson, the only engineer connected with this
tragedy, was manifest factual error imposing a wholly unjust result
upon DeRay Jacobson's family.

Further, it was demonstrated on Motion for New Trial that

Albert Young had no special knowledge concerning C.F. & I's 270 K strand. The only information he actually had concerning the strand, strength and specifications is that contained in Ex. 1, the literature which the trial court held "did not adequately state the limitation of 270 K strand when used as a hold down device" and "did not contain adequate warnings". R.A. 245, 231, 232. Young merely adopted his own arbitrary standard within the 31,000 pound limitation represented by C.F. & I. He said merely:

I have arbitrarily drawn a line at 18,000.
Tr. 38

Albert Young therefore merely adopted a standard within the limitations of the defendant's product stated in its literature. Floyd Swenson, the engineer actually connected with DeRay Jacobson's death, adopted another standard, still well within the limitations of the defendant's product as stated in its literature. Under the trial court's decision the Jacobson family is penalized because Mr. Swenson did not know or apply Mr. Young's personal standard. C.F. & I., a tortfeasor found by the trial court to have failed to adequately warn of the limitations of its strand, is rewarded by this penalty.

2) Assuming arguendo that Albert Young had some connection with DeRay Jacobson's death and knowledge of the unexpressed limitations of 270 K strand, C.F. & I. is severally liable as a joint tortfeasor under controlling Montana law.

Since Erie R.Co. v. Thompkins, 308 U.S. 64, 58 S.Ct. 817, 122 L. ed. 1188, 114 A.L.R. 1487 (1938) it has been axiomatic that

Federal district courts must follow the law of the states in which they sit when deciding cases of this nature. It is the law of Montana that more than one person may be liable for causing injury; and C.F. & I. is liable for its negligence which caused the death of DeRay Jacobson, regardless of any concurrent negligence, knowledge, acts or failures of Albert Young. The trial court's decision that C.F. & I. was "insulated" from liability by the knowledge of Albert Young is contrary to Montana law.

Negligence on the part of C.F. & I. is established by the findings and decisions of the trial court:

The defendant knew that its 270 K strand would be used for hold down devices although the strand was not furnished specifically for that use. The defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous. The defendant knew that a single strand of 270 K should not be used in hold down devices where tensions of more than 15,500 pounds are developed. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device.

The defendant's literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold down device,....
R.A.232.

Accordingly the trial court found C.F. & I. negligent for breach of the duty to warn. In addition to the American Law Institute Section 388 of the Restatement of the Law, Torts, Second, relied on by the trial court, the duty to warn was imposed on C.F. & I. by Hopkins v. Ravalli County Electric Co-op., Inc., 44 Mont. 161, 395 P.2d 106 (1964) and Section 58-607 Revised Codes of Montana, 1947, as amended.

In Hopkins v. Ravalli County Electric Co-op, Inc., supra, the Supreme Court of Montana held appellant liable for negligence in failing to warn the respondent of poisonous weed spray which killed respondent's cattle. The court said:

These facts above point out two important things to this court:

(1) That appellant had KNOWLEDGE of the nature of the poisonous substance and its danger to animals;

(2) That with this knowledge, appellant failed to give NOTICE to respondent, an adjoining landowner. Thus we conclude in this particular case, under these particular facts, that appellant's ownership of the land upon which the poison was sprayed is immaterial, that there was an implied invitation to respondent, from the continuous usage for years by respondent of the strip of land as pasture, and that, therefore, appellant owed a duty to respondent to warn of the poisonous spray, especially where appellant had knowledge of the nature of the spray and the dangers it presented. We hold that the jury and judge in the lower court were justified under the facts of this particular case in finding a breach of the duty to warn, and thus finding appellant guilty of negligence.

(See R.C.M. 1947, §58-607, which says, 'Everyone is responsible, not only for the result of his wilfull acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully, or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.') (Emphasis added except at the words 'KNOWLEDGE' and 'NOTICE' which the court emphasized) 144 Mont at 166-167, 395 P.2d at 108,9.

Comparing the two facts there emphasized by the Montana Supreme Court with the Findings and Conclusions in this case makes it clear that C.F. & I. was guilty of negligence. C.F. & I. with knowledge of the use, nature, limitations and danger of its product failed to notify anyone of these matters.

The trial court found negligence, but even if it had not the evidence clearly established C.F. & I.'s negligence. C.F. & I. not only failed to give warning of known dangers but published Bulletin PC 955 (Ex.1) giving information misleading and inconsistent with the known limitations of the strand. C.F. & I. well knew the manner in which its strand was used at United Prestress having observed the hold down technique through several of its agents. Tr. 28,66,104,105. These opportunities to give warnings were never taken; the hold down procedure was never criticized.

In Montana negligence is:

...a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Section 19-103, R.C.M. 1947, as amended.

Negligence, as applied to acts of omission, is the failure to do what a reasonable and prudent person would ordinarily have done in the circumstances of the situation. In re Mullen's Estate, 97 Mont. 144, 33 P.2d 270, 272 (1934) Ahlquist v. Mulvaney Realty Co., 116 Mont. 6,23,152 P.2d 137, (1944).

As noted by the Montana Supreme Court in Hopkins v. Ravalli County Electric Co-op, Inc., supra, Section 58-607 of the Revised Codes of Montana 1947, makes everyone responsible for an injury occasioned to another by want of ordinary care or skill in the management of property or person.

Having found C.F. & I. negligent, Montana law did not permit the trial court to relieve C.F. & I. of liability for its negligence if that negligence was either the proximate cause or one of the

concurring proximate causes of DeRay Jacobson's death.

proximate cause is established by the testimony of Floyd Swenson quoted above. His statement demonstrates that the inadequacies and boasts in C.F. & I.'s Bulletin PC 955 (Ex.1) killed DeRay Jacobson.

For the convenience of the court a portion of his testimony is again reproduced:

Q: I show you what have been received in evidence as plaintiffs' exhibits 1 and 2 and ask you to look at those, please. Do you recognize either of these exhibits?

A: I recognize No. 1.

Q: Would you tell us what that is, please?

A: This gives the specifications and physical properties of 270 K Strand.

Q: Was that available to you when you were working for the United Prestress on October 1, 1964 and prior thereto?

A: Yes sir.

Q: Was the other exhibit, Plaintiffs' 2, available to you at that time?

A: I don't recognize this one.

Q: I notice here there are some pencil markings and things inside Plaintiffs' No. 1. Do you recognize what they are, not what they mean?

A: Yes sir.

Q: And what are they?

A: They are numbers I used in designing.

Q: That is your handwriting?

A: Yes sir.

Q: Then is this Plaintiffs' Exhibit No. 1, was that a source of your information concerning the strength characteristics of Colorado Fuel and Iron Type 270 K strand, prestress concrete strand, 7/16ths inch diameter?

A: Yes.

Q: Did you have any other information from Colorado Fuel and Iron Company concerning the strength characteristics of the strand, other than this material?

A: Not that I recall.
Tr. 64-65

* * *

Q: Did you ever seek any other information with respect to 270 K prestress concrete strand from C.F. & I., or any other company?

A: No sir.

Q: You relied solely upon this brochure, is that correct?

A: Correct.

Q: Do you know whether there is a substantial amount of literature written about 270 K strand or other types of prestress concrete strand?

A: By brand name.

Q: Not necessarily by brand name but I will start first with a brand name.

A: I don't know of anything else that would mention C.F. & I. strand, no. Tr. 85
(Emphasis added)

It is clear from Mr. Swenson's testimony that had C.F. & I. either given an adequate warning as to the limitation of 270 K strand or refrained from making the misrepresentations concerning its strength contained in the bulletin that DeRay Jacobson would not have been killed. The negligence of C.F. & I. was a proximate

cause of the strand failure resulting in the injuries and death of DeRay Jacobson. The proximate cause of an injury is defined in Montana law as:

That cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred. McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932)

That quotation states the law as repeatedly announced by the Supreme Court of Montana. Wallace v. Chicago M. & St.P.Ry.Co., 8 Mont. 427, 138 Pac. 499 (1914); Kirby v. Oregon Shortline R. Co., 59 Mont. 425, 197 Pac. 254 (1920).

The Montana law of proximate cause points to C.F.& I., but it excludes Albert Young who was not in the chain of events leading to the death of DeRay Jacobson. However even if we assume as the court did that Albert Young knew the limitations of C.F.& I. strand and that knowledge, or some other act or omission on his part, contributed in some way to Jacobson's death, Montana law does not permit C.F.& I. to be relieved of liability. The negligence of C.F.& I. was clearly a concurring cause of Jacobson's death. C.F.& I. was at least a joint tortfeasor, and any act or omission of Albert Young be it innocent, tortious or criminal, is not sufficient to relieve C.F.& I. from liability. Restatement of the Law, Torts, Second, §439.

In Lake v. Emigh, 121 Mont. 87, 190 P.2d 550 (1948) the applicable rule was stated by the Supreme Court of Montana as follows:

Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against either or all of the responsible persons although one of them was more culpable and the duty owed them to the injured person was not the same. (Emphasis added).

That law is so well settled in Montana that it is the source of a standard jury instruction in the Montana Jury Instruction Guide. Montana Jury Instruction No. 12.01 reads:

More than one person may be responsible for causing injury. If you find that the defendant was negligent and that his negligence proximately caused injuries to the plaintiff it is not a defense that some third person may also have been negligent.

As recently as July of 1967, the Montana Supreme Court reaffirmed that rule. In Benner v. B. F. Goodrich Co., 4 St.Rep. 617, 621, the court quoted an earlier decision with approval (Black v. Martin, 88 Mont. 256, 265, 292 Pac. 577) as follows:

If the concurrent negligence of two or more persons causes an injury to a third person, they are jointly and severally liable, and the injured person may sue them jointly or severally and recover against one or all.

That principle, violated by the trial court's decision, is also recognized in the American Law Institute's Restatement of the Law of Torts, Second:

§439. Effect of Contributing Acts of Third Persons
When Actor's Negligence is Actively Operating.

If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor

§442 A. Intervening Force Risked by Actor's Conduct.

Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

§442 B. Intervening Force Causing Same Harm as That Risked by Actor's Conduct

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Within Restatement terminology C.F. & I.'s negligence as an "active and substantial factor" in bringing about the death of DeRay Jacobson. Whether or not anything done or omitted by Mr. Young influenced the death of Mr. Jacobson, the liability of C.F. & I. is not affected. It remains liable at least as a joint tortfeasor.

Under these rules and the controlling Montana decisions, the trial court's Finding of Fact XIV (R.A. 231) compels entry of judgment for the plaintiffs against the defendant.

PLAINTIFFS HAVE NO BURDEN TO DISPROVE INDEPENDENT INTERVENING CAUSE.

"Insulation" from liability, if there is such a thing, has never been recognized in the Montana law. If the term refers to "independent intervening cause", and from the context of its use we assume it does, then the court erred in invoking it.

By the court:

. . . the court is of the opinion that Young had this knowledge prior to the accident, but if he did not then the plaintiffs failed to sustain their burden of proving a lack of knowledge. (R.A. 231)

* * *

The defendant's literature did not contain adequate warnings . . . but by reason of the knowledge the United Prestress technicians had of such limitations such failure does not make defendant liable in this case. (R.A. 232, 233)

* * *

. . . it is sufficient to insulate the supplier from liability for failure to warn if the warnings given are sufficient to apprise the engineers or technicians of the dangers involved, or if the technicians have knowledge of the dangers involved. (R.A. 233)

What the court did is impose a burden on defendant to disprove the guilt of Mr. Young. Besides being immaterial because of the joint tortfeasor rules, this imposes the defendant's burden upon plaintiffs.

Independent intervening cause may be a legal defense, if it exists in a case. But defendant must affirmatively prove its existence by a preponderance of the evidence. Doubt on the issue must be resolved in favor of plaintiffs.



Sec. 433 B. Burden of Proof.

(1) Except as stated in subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiffs is upon the plaintiffs.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiffs, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm. (Emphasis added)

See also 65 A C.J.S., Negligence, Section 209 p. 482,

and cases cited at note 32 therein.

The court was in substantial doubt, it is implicit in the way it dealt with the possibility of Young's knowledge. (R.S. 231) It places the burden upon plaintiffs to prove the negative, that Young did not have some knowledge upon which C.F. & I. might rely. This is out of harmony with the Montana evidence statute which generally requires proof only of the affirmative 93-401-26, R.C.M., 1947.

Despite the fact that they had no duty to do so, plaintiffs went quite a long way in their evidence on this issue. Sole responsibility for the design and force was Swenson's. (Tr. 63, 67) Mr. Young is the "chief" (and only) technical person now. But he was not in 1967.

A. At the time of this incident, I was what is more commonly referred to as a production coordinator, take care of the office records, so to speak, and in part did enter into sales and engineering to a small degree. I think that pretty well covers it. (Testimony of Albert Young, Tr. 5)

As a witness his testimony was that of an informed observer, not a participant. His presence and his acts or omissions, whatever they may be, were collateral to the casual chain leading to Mr. Jacobson's death.

What more should plaintiffs prove? Fairly defendant should come forward with evidence if it seeks exoneration because of an intervening circumstance.

ASSUMING THE FACTS AS FOUND BY THE COURT, AND THE RULE OF LAW IT ADOPTED, THE COURT REACHED THE WRONG RESULT.

The trial court adopted Section 388 Restatement, Torts, Second, as the law of Montana in the absence of controlling decisions of our supreme court. We do not quarrel with this. But the court did not follow through and properly apply it to the facts as the court found them in this case. Under this rule, on such facts, C.F. & I. owed to Mr. Jacobson a duty to furnish him the information he needed to safely work with 270 K strand. C.F. & I. failed to do this.

The Restatement section reads:

Sec. 388. Chattel Known to be Dangerous for Intended Use.

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. (Emphasis added)

- (1) The duty imposed upon C.F. & I. runs to Mr. Jacobson as the actual physical user of the strand.

The comment of the editors makes this quite clear. The

first paragraph of the comment emphasizes this point:

The words 'those whom the supplier should expect to use the chattel' and the words 'a person for whose use it is supplied' include not only the person to whom the chattel is turned over by the supplier but also all those who are members of a class whom the supplier should expect to use it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind.

Yet, the trial court, after adopting the Restatement as the rule of decision turned around and said:

There is no duty to warn those who simply follow the directions of the engineers or technicians . . .
(by the court, R.A. 233)

There is no way to reconcile the court's statement with the clear meaning of the Restatement. Nor can it be reconciled with the basic reason, need to know, underlying the duty to warn. The man handling 270 K strand needs to know how far he can safely stress it without being exposed to the hazards of breaking, flying iron and steel.

Warning was absolutely essential to safe use of defendant's strand. In use for hold downs the strand is very dangerous, the court so found. It also found that C.F. & I. knew how United Prestress was using 270 K in its hold down device, knew its limits and did not advise anyone of such limitations. (R.A. 231)

The trial court reached the wrong result therefore, the duty to warn Mr. Jacobson did exist and it was breached. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold down device". (by the court R.A.231)

- (2) The Defendant's duty to Mr. Jacobson required that the warning be given to Mr. Swenson, the designer.

The Restatement makes allowance for the possibility that the supplier may furnish the product through a "third person". In this case, the "third person" was United Prestress and its design technician, Mr. Swenson. It was Mr. Swenson to whom C.F. & I. should have directed its warning because he was the man who decided how much stress should be imposed on the hold down device. This is a part of the design of the beams on which Mr. Jacobson was working when he was killed. (Ex. 7b).

In the casting bed everything is done in terms of feet and inches; Mr. Jacobson and his crew stretched the strand a specified distance to develop the required tension. The measurements for each job are furnished to the workmen by the designer who, in his work, translates pounds of stress into terms of distance for the crew to stretch the strand.

C.F. & I. must alert the designer to the safe limits of the strand so he can incorporate the information into a safe design, translate it into terms of distance to stretch and thus pass it on to Mr. Jacobson. There is no other way to get the information to him and he must have it. He cannot work safely without it, because there is no way for him to know when he approaches the stress limit. The danger is great but subtle, it is undetectable until the steel starts to fly.

In comment 'n' the Restatement editors indicate that the duty to warn is often discharged by warning the "third person":

Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

The Montana case of Hopkins v. Ravalli County Electric Co-op., Inc., 144 Mont. 161, 395 Pac. 2d 106, is closely analagous. There the Montana Supreme Court found the co-op liable for failure to warn a neighbor that poison spray had been used on weeds, in an area where the co-op knew that the neighbor's cows were used to grazing. The court found that the co-op knew that the cows grazed in the area, knew that the spray was dangerous, and it could have warned. It was liable for neglect to issue the warning to the owner of the cows who, presumably, could have taken steps to see that the cows were not exposed to the danger. The same factors exist in this case. C.F. & I. had full knowledge of all the factors and could have warned Mr. Swenson to take steps to see that Mr. Jacobson and his crew were not exposed to this danger. Mr. Jacobson had no better chance of protecting himself

than did the cows. Warning the rancher would have saved the cows; warning Swenson would have saved Mr. Jacobson.

The trial court erred when it found no duty requiring C.F. & I. to warn Mr. Jacobson; C.F. & I.'s duty was to inform Mr. Jacobson through a warning directed to Mr. Swenson. For failure to do so C.F. & I. should be held liable.

(3) The finding of "insulation" is contrary to the Restatement rule which the trial court adopted.

Upon Mr. Young's assumed knowledge the court "insulated" C.F. & I. from liability with this explanation:

. . . there is no duty of a supplier of a chattel to foresee that the engineers and technicians will fail to follow warnings given or to employ knowledge possessed. (by the court, R.A. 233)

There was no warning to the technicians, nor any knowledge on their part, to support this assertion by the court. And it is contrary to the Restatement rule.

/One who supplies dangerous goods is liable if he/

b. has no reason to believe /user/ will realize its dangerous condition, and

c. /he fails to take reasonable care to warn/.

The meaning of the formal statement above is amplified

at comment k:

k. When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved. It is not necessary for the

supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made. However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier, having such special experience, knows that the condition involves danger and has no reason to believe that those who use it will have such special experience as will enable them to perceive the danger, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.

To rely upon knowledge of Mr. Jacobson or of the design technicians for insulation C.F. & I. must have "reason to believe" that they have the requisite knowledge. It is bound to warn of the dangers in 270 K as a hold down unless it has "reason to suppose that they will realize " the danger.

The record contains no evidence which could possibly justify a reasonable belief that Mr. Jacobson had the ability to recognize the danger limit for stress in the hold down. Likewise, the record shows no "reason to believe" that Mr. Swenson had such knowledge when he designed the beam. Mr. Swenson did not know. (P. 23, this brief). The words "reason to believe" imply a rational process; the formation of a belief based upon facts. There is no evidence in the record of any facts upon which C.F. & I. could rationally form a belief that warning was not required.

The evidence pertinent to the problem is all to the contrary.

C.F. & I. Bulletin PC 955, (E 1), speaks of 270 K as an

engineering break through." It speaks of such things as "minimum ultimate strength", 31,000 pounds; "breaking strength" 1,000 pounds; 15% stronger than ASTM grade; use six 270 K strands in place of seven of the ASTM.

Every adjective used in PC 955 is a superlative; e.g., important engineering break through; distinct advantages; rapidly growing wide acceptance; thorough testing; easy to handle; greater saving.

The bulletin says "This folder has been prepared to provide complete information on the physical properties of the strand." That immodest statement was intended to be relied upon and it was, by Mr. Swenson.

C.F. & I. knew before Mr. Jacobson was killed the method and practice of United Prestress in its hold down operations. The hold down procedure was no better before Mr. Jacobson was killed than it was when C.F. & I. criticized it at the trial. The information C.F. & I. had pointed to a necessity of warning; it did not support an assumption that warning was not required.

These factors were overlooked by the court, otherwise it could not rule that assumed knowledge of the wrong designer insulated C.F. & I. from a duty to see that Mr. Jacobson was given safe information in the measurements for stretching the strand. The Restatement, adopted by the court, was not followed to the result it clearly requires in this case.

- 4) If C.F. & I. relies upon the safety knowledge of the designer to justify not warning, it must accept the risk involved that he will not have such knowledge.

When the knowledge of the technician, Swenson, in this case, is relied upon by the supplier for accomplishment of the objective of putting the information in the hands of the workman there exists an inherent risk that the technician will be ignorant, that he will not in fact have the required technical knowledge. That risk existed in this case and unfortunately this case demonstrates that all technicians designing in prestress technology did not have the safety information required.

The risk inherent in reliance upon the knowledge of the technicians must be assigned to and borne by either the workman or the supplier. Almost by definition the workman cannot know the scope of the technician's competence - if he knew that much he would almost be a technician himself. The workman, if the risk is assigned to him, cannot appreciate it and he cannot protect himself. On the other hand, C.F. & I., the supplier, by virtue of its expertise and its staff of field representatives, did know the risk, appreciated its significance and could have taken effective action. One short sentence added to its technical brochure, Ex. 1, would have done the trick.

The risk involved should be assigned to the party who is in a position to control the situation. In this instance that party is the supplier, C.F. & I. The risk that Swenson was inadequately informed should be borne by C.F. & I. because it either elected to rely on such knowledge to get the safety information to Mr. Jacobson or else it neglected the whole problem.

It did not warn.

At comment 'n' the Restatement editors discuss the assignment of the risk inherent in trusting the third party. Their consideration is directed to the risk that warnings given will not be passed on to the workman. The same risk exists that knowledge possessed will not be passed on. The risk is assigned to the supplier.

...it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate...it may be improper to permit him to trust the conveyance of the necessary information /about/ . . .a highly dangerous article to a third person of whose character /or technical knowledge/ he knows nothing. It may well be that he should take the risk that this information may not be communicated unless he exercises reasonable care to ascertain the character of the third person /or from knowing him or his reputation/ he has positive reason to believe that he is careful. . . .if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

Reasonable care requires of C.F.& I. that it do one of two things. At a minimum it might publish a warning in its technical bulletin. Perhaps the warning should have been followed up but at least it should have been given. Alternately, C.F.& I. should have made it its business to know by inquiry how much knowledge the design technicians had. The gap in Swenson's knowledge would have been discovered and remedied. Because overstressed 270 K is so terribly dangerous, it may be reasonable to require all of these things. But, in any event, it is not reasonable to

excuse C.F. & I. from any duty at all as the trial court did.

Certainly the possible harm here involved compels C.F. & I. to make some effort toward safety. What C.F. & I. did was, at most, make a bare assumption of Swenson's competence. It may not have done even this much, it may have ignored the whole problem. This abrogates the duty, it permits C.F. & I. to supply a lethal product and do absolutely nothing about safety. This is improper if there is any merit in the duty to warn concept.

The trial court decision permits this material to be sold with utterly no attention paid to safety in its utilization. The Restatement rule is thus violated and stripped of any meaning at all.

(5) Under Section 388 Restatement, Torts, Second, C.F. & I. is liable for damages to the Jacobson family.

270 K is a highly dangerous product supplied by C.F. & I. through Mr. Swenson for actual use by Mr. Jacobson in the hold down. C.F. & I. knew this and knew that safety required a limit to the stress when it is so used. It did not advise either Mr. Jacobson or Mr. Swenson of this limitation; rather it published literature touting the 31,000 pound strength of the strand and claiming thorough testing in casting beds.

Had Mr. Swenson known or been warned of the limitations of the strand this tragedy could have been avoided. C.F. & I. did not warn; Swenson did not know and C.F. & I. must accept the risk that he might not know, it had no reason to believe that he did.

Properly applied, the Restatement rule holds C.F. & I. to answer for the damage suffered by the Jacobson family. It failed to warn when it knew warning was essential to safety.

C.F. & I. SHOULD HAVE BEEN HELD LIABLE FOR BREACH OF THE EXPRESS WARRANTIES STATED IN ITS BULLETIN AND ADMITTED IN THE PLEADINGS.

(1) Express warranties were stated and breached.

C.F. & I.'s sales Bulletin PC 955 introduced in evidence as Exhibit 1 warrants its 270 K strand to have a "minimum ultimate strength" of 31,000 pounds and a minimum "Breaking Strength" of 31,000 pounds. When the strand failed and killed DeRay Jacobson the load upon it was 22,600 to 23,250 pounds, the higher load conservatively assumes 100% friction at the holdup points and complete vertical deflection of the horizontal strands. Tr. 147. C.F. & I. introduced somewhat speculative evidence that the load may have been as high as 25,250 pounds (Tr. 440), which is still 5,750 pounds under the warranted strength. Thus under any view of the evidence the strand failed at less than 31,000 pounds. The trial court so found:

The court makes no finding as to the exact tension at which the hold down strands break except that the strands did fail at a tension of less than 31,000 pounds. (Emphasis added) R.A. 228.

C.F. & I. admitted by answer "that DeRay Jacobson was injured and that he died from injuries caused by the breaking of a hold down strand and the oscillation of the other strands. . ."

This establishes the liability of C.F. & I. to DeRay Jacobson's family for breach of expressed warranties and resulting death of their husband and father. Hanson V. Firestone Tire & Rubber Company, 276 F.2d, 254, 257 (1960):

In an action of the present character, the burden of proof resting upon the plaintiff entails merely demonstration that the goods did not have the properties warranted.

In the absence of the controverting evidence adduced by the defendant, which convinces the jury that the goods were as warranted, plaintiff should prevail. *Hertzler v. Mansham*, 228 Mich. 416, 200 N.W. 155. The plaintiff is not required to show the technical causation of the goods' failure to match their warranty. Nor is it necessary that the manufacturer's negligence be shown as the cause of such failure. 276 F. 2d at 258. (Emphasis added)

Randy Knitwear, Inc. v. American Cyanamid Company, Ct. App. N.Y. 1962, 181 N.E. 2d 399; *Bonker v. Ingersoll Products Corporation*, D. Mass. 1955, 132 F. Supp. 5; *Haman v. DiGlioni*, Conn. 1961, 174 A.2d 294; *Baxter v. Ford Motor Company*, Wash. 1932, 12 P.2d 409; *Sentor v. B. F. Goodrich Co.*, 127 F. Supp. 705, 707-708.

The trial court ignored judicial admissions of express warranty in C.F. & I.'s answer (R.A. 48, L. 28-32; 49) and adopted an erroneous and strained construction of C.F. & I. sales literature (Ex. 1). The result is reflected in Finding of Fact XII and Conclusion of Law III wherein the trial court held C.F. & I. "did not warrant or represent that 270 K strand would withstand a tension of 31,000 pounds when used in a hold down device such as was employed by United Prestress at the time of the accident." (R.A. 232, 230). In view of the admissions of C.F. & I., the language of its sales bulletin (Ex. 1) and C.F. & I.'s knowledge of the United Prestress hold down system (R.A. 231) this was clearly error.

The Jacobson family is entitled to recover upon these expressed warranties admitted in C.F. & I.'s answer:

Defendant admits that Type 270 K prestressed concrete strand was and is expressly warranted by the defendant to have a minimum ultimate strength of 31,000 pounds



(and to be capable of safely sustaining such load or stress). Ex. 19. R.A. 48.

By amendment C.F. & I. withdrew from its answer that portion of the language quoted surrounded by parenthesis. Thus perhaps C.F. & I. withdrew from that class of admissions absolutely binding upon it its warranty of "safety" at a 31,000 pound load, but not the warranty of minimum strength. At any rate, the language removed was introduced in evidence in Ex. 19 as an admission against interest. Gardner v. Eclipse Grocery Co., 72 Mont. 540, 546; 234 Pac. 490 (1925); McDonald v. Peters, 128 Mont. 241, 272 P. 2d 730 (1954). No contradictory evidence was offered or received.

The admission that 270 K strand was and is expressly warranted by C.F. & I. to have a minimum ultimate strength of 31,000 pounds remains in the answer; it is sufficient to establish an expressed warranty by itself.

Independently of those admissions, bulletin PC 955, in evidence as Ex. 1 expressly warrants in the strongest language possible, 270 K strand to be capable of sustaining a load of at least 31,000 pounds when used in the manufacture of prestressed concrete objects as it was in this case. In Table 1 for 7/16 diameter strand, the bulletin warrants:

Breaking strength of Strand Min. lb. 31,000

Table 2 warrants Type 270 K strand (7/16) diameter to have a minimum ultimate strength of 31,000 pounds.

The C.F. & I. bulletin P C 955 (Ex. 1) further assures the

user that "extensive testing" has been carried out, proving its adaptability to use in "grips of the type employed in casting beds". C.F. & I.'s publication headed "SPECIFICATIONS AND PHYSICAL PROPERTIES", purports to be exhaustive, i.e.:

This folder has been prepared to provide complete information on the physical properties of the strand.

The strand which failed was a hold down strand, and in that connection the trial court found C.F. & I. "knew that its 270 K strand would be used for hold down devices although the strand was not furnished specifically for that use" and "the defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous". (Finding XIV. R.A. 231)

The strand that killed DeRay Jacobson being loaded only to 23,250 pounds or less did not display either a minimum "breaking strength" or "minimum ultimate strength" of 31,000 pounds giving either of those phrases their ordinary and reasonable meaning.

In the face of that evidence, the trial court focused attention solely on the phrase "minimum ultimate strength" and held that C.F. & I. did not expressly warrant 270 K would withstand a load of 31,000 pounds in the application which killed Jacobson, by reason of the following ambiguous language quoted by the court from a paragraph in Ex. 1:

/entitled DUCTILITY/



Thorough testing has been conducted using Type 270 K strand in wedge grips of the type employed in casting beds. Also, the strand was deflected around pins as it would be in a casting bed. Comparison of these test results with results of similar tests on ASTM Grade strand shows that the efficiency of Type 270 K strand under these conditions, measured as a percentage of its ultimate strength, is comparable to that of C.F. & I. - Roebling ASTM Grade strand. (Emphasis partially added by the court). (Ex. 1) (R.A. 230).

The trial court's construction of Ex. 1 and resulting

failure to hold C.F. & I. liable for breach of warranty is erroneous for the reasons stated in the following arguments:

(2) The key word in the language quoted, the ambiguous "efficiency" cannot reasonably be equated with and given the same meaning as the clear positive assertions of minimum "Breaking Strength" contained in the literature.

To sustain the trial court one must give the phrase

"minimum ultimate strength" a special and extraordinary meaning and view C.F. & I.'s paragraph on "DUCTILITY" as stating or intending to state by use of the word efficiency that its strand will break when used under tension at less than 31,000 pounds, or that it will break at the same load level as ASTM Grade strand. Neither construction is reasonable.

In the trial court, C.F. & I. devoted evidence and considerable argument to the proposition that the 270 K strand which failed met specification for ASTM Grade strand. Tr. 325, but see 329-331. It was urged that "minimum ultimate strength" had a special meaning and it was urged that all that is really required is that the strand meet ASTM Grade specifications. This may be what led the trial court into error.

In addition to furnishing specific load bearing capacity for 270 K strand, greater and different than that for ASTM Grade strand, C.F. & I.'s bulletin fairly shouts the greater strength of 270 K strand as compared to ASTM Grade strand and the advantages to be gained thereby. Among other items of information given are the following, not quoted above:

Type 270 K, 7-wire uncoated stress-relieved prestressed concrete strand, an important engineering break-through recently announced by C.F. & I. - Roebling, has approximately 15% greater strength than ASTM Grade strand. This quality together with its other inherent properties, imparts many distinct advantages to Type 270 K strand -- fewer strands to be handled, . . . a larger prestressing force can be placed in a member . . .

* * *

DESIGN LOAD

Six Type 270 K strands will replace seven ASTM Grade strands of the same diameter.

* * *

COST COMPARISON

Under Design Load it was shown that six Type 270 K will replace seven ASTM Grade strands so we can use 12 Type 270 K in place of 14 ASTM Grade strands.

Additionally in the SPECIFICATION paragraph the bulletin states:

Type 270 K strand shall be fabricated and tested in accordance with the requirements of ASTM Designation A416-59T with the exceptions shown in Table #1 opposite. (Emphasis added)

Table #1 states in clear and unequivocal language that 270 K 7/16 diameter strand has a "Breaking Strength" of strand Min. lb. 31,000. This leaves no doubt but that Type 270 K strand is warranted to have greater strength and specifically a minimum

breaking strength of 31,000 pounds when utilized in the prestress manufacturing process.

Turning to the actual language upon which C.F. & I. was permitted to escape liability, it actually refers to performance (efficiency) of Type 270 K strand in a completed product.

"Ductility" as the word itself connotes, refers to the flexibility and capability of the strand to be pulled or fashioned into new form. To the engineer it refers to the elastic action range of the strand essential to optimum performance from the material as part of a completed concrete structure. (Tr. 140-143). The sense of the DUCTILITY paragraph is that 270 K strand will have the desired elastic action essential to good performance in a completed concrete structure when it is stressed to a high percentage of its minimum load bearing strength. This is also a characteristic of ASTM Grade strand and therefore the reason for the comparison.

The elastic action of the strand can be crudely compared to that of a rubber band. The strand reaches a point under tension when it will not spring back to its original form. (Tr. 340-344). It is this point to which the paragraph on DUCTILITY obviously refers. The trial court erred in equating this with the warranted load carrying capacity and breaking point of the strand.

It is inconceivable that C.F. & I. intended to make a statement of lesser strength in the "DUCTILITY" paragraph when



no specific strength figure is set forth and nothing is said with respect thereto in the "DESIGN LOAD" and "SPECIFICATION" portions of the literature. It is the DESIGN LOAD and the SPECIFICATION portions of the bulletin which refer us to Table 1 and Table 2 containing the statements: "Breaking Strength of Strand Min. lb. 31,000" and "Minimum Ultimate Strength 31,000#". Those paragraphs are the portions of the bulletin which have to do with the load bearing strength of the strand. On the basis of the relevant portions of the literature Mr. Swenson, who calculated and designed the forces to be imposed on the C.F. & I. strand rightly believed that language and took C.F. & I. at its word. He testified:

A. The ultimate capacity of the strand is the maximum load we can put on the strand before failure.

Q. And that's 31,000 pounds?

A. 31,000 minimum, correct.

(Tr. 82)

Assuming arguendo that the phrase "minimum ultimate strength" has a special meaning by reason of the reference to efficiency in the DUCTILITY paragraph of the bulletin, there can be no doubt as to the meaning of the other phrase: not

"Breaking Strength Min. lb. 31,000."

Webster defines:

BREAKING STRENGTH or BREAKING STRESS -- the greatest stress esp. in tension that a material is capable of withstanding without rupture.

He defines "BREAK" as "to separate into parts with suddenness or

violence" "rupture" "penetrate , pierce" "to exhaust in . . . strength or capacity" "to come apart or split into pieces". Webster's Third New International Dictionary-Unabridged, a Merriam-Webster.

In this day and age when clearly expressed disclaimers are construed away or held invalid by the courts, C.F. & I. cannot avoid the effect of its strong, clear, positive language of the 31,000 pound breaking strength of its product on the basis of a word as ambiguous as "efficiency"! (see Fairbanks Morse & Co. v. Consolidated Fisheries Co., 3 Cir. 190 F.2d 817; Berk v. Gordon Johnson Company, ED Mich. 1964, 232 F. Supp. 682, 686-687; Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 ALR 2d 1, 14, 22 (1960).

The rule of construction which the trial court should have applied is stated in Lane v. C. A. Swanson & Sons, (Cal. App. 1955) 278 P. 2d 723, 726. There the court stated:

The tendency of the modern cases is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods and to enlarge the responsibility of the seller to construe every affirmation by him to be a warranty when such construction is at all reasonable.

Lane v. C. A. Swanson & Sons is analagous to the instant case. There plaintiff was injured by a bone fragment from defendant's can of "boned chicken". That language appeared on the label and the defendant had also advertised that its chicken contained "no bones". The defendant urged that the term "boned chicken"



was merely descriptive of the manner in which the product was prepared and packaged and that it did not constitute a warranty that the contents of the can were wholly free of bones. In response to that argument the court said:

And with respect to the theories of the defendants it may be asked how many bone fragments would be permissible without contradicting the representation that there were no bones. Defendants argue that it is impossible to extract the bones of a defunct chicken without leaving in the remains small slivers or pieces of bones. . . .

Plaintiff testified that his understanding at the time he purchased the 'Boned Chicken' was 'just what the reading on the label implied, chicken without bones.'

Our conclusion is that the label on the can, coupled with representation in the newspaper ads that the contents contained no bones, constituted an express warranty and that the same was breached. If there could be a doubt as to the meaning of "boned chicken", it was removed by the statement that it contained no bones. 278 P. 2d at 726. (Emphasis added)

We invite the court's attention to the underlined portions of the language quoted above which is particularly applicable to the facts of this case. Here as in Lane the defendant urged that minimum ultimate strength had a meaning other than that which those words would normally be given. The trial court agreed and focused attention solely on that phrase, ignoring the even stronger phrase, minimum "Breaking Strength of Strand". In Lane the defendants argued the impossibility of extracting all the bones from a defunct chicken while here the evidence left no doubt that 270 K prestressed strand will hardly ever hold 31,000 pounds in normal usage. (Ex. 11, p. 15 Tr. 463, Tr. 325, Tr. 435)

Here Mr. Swenson testified that his understanding was just what the literature stated, that the minimum ultimate strength of the strand "is the maximum load we can put on the strand before failure."

Q. And that's 31,000 pounds?

A. 31,000 minimum, correct.

The last paragraph quoted from Lane v. C. A. Swanson & Sons, supra can be applied to that portion of C.F. & I.'s bulletin ignored by the trial court, viz.,

If there can be a doubt as to the meaning of . . .
/minimum ultimate strength/ it was removed by the
statement that it /had a Breaking Strength of Strand
Min. lb. 31,000/ . . .

It is the position of the Jacobson family that if there is doubt (and the trial court expressed doubt, R.A. 230) as to the meaning of the phrase "minimum ultimate strength" and the word "efficiency", C.F. & I. removed the doubt by its unequivocal statement that its strand had a minimum Breaking Strength of 31,000 pounds. The trial court erred not only in construction of the phrase "minimum ultimate strength" but in focusing attention solely on that phrase to the exclusion of the even stronger language stating C.F. & I.'s warranty of a 31,000 pound minimum breaking strength.

Construction of Ex. 1 in its entirety leads to the inescapable conclusion that C.F. & I. expressly warranted its product to have a minimum breaking strength of 31,000 pounds without diminution by reason of normal conditions existing when the



strand is used in the manufacture of prestressed concrete objects. The law does not permit the trial court to construe the language of Ex. 1 strictly against the Jacobson family, but requires the language used by C.F. & I. to be construed liberally in their favor and strictly against C.F. & I. Lane v. C. A. Swanson & Sons, supra; Fairbanks, Morse & Co. v. Consolidated Fisheries Co., supra, 190 F. 2d 817; cf. Henningson v. Bloomfield Motors, supra, 32 N.J. 358, 161 A. 2d 69, 75 ALR 2d 1.

(3) The courts will not give effect to derogation or even disclaimer of a warranty expressed in other portions of the literature, but will give the expression of warranty controlling effect.

Given the trial court's construction, the language of the DUCTILITY paragraph derogates from the warranties clearly expressed elsewhere in the publication. That ambiguous language is not clear enough to be termed a disclaimer, yet even a clearly expressed disclaimer will not be given effect by the courts to impair a warranty expressed in the document.

In Fairbanks Morse & Co. v. Consolidated Fisheries Co., supra, the court of appeals for the 3 circuit made a statement which is applicable here:

Even if the warranty in the Specification be considered express, the district court deemed it to be ineffective because of the disclaimer provisions. If we were convinced that the express warranties contained in the Specification were completely contradicted by the disclaimer clauses, we would have no doubt in resolving the conflict by holding that the former must prevail. Every reasonable rule of construction points in that direction. The rule that a contract is construed strictly against the draftsman would lead us to resolve our doubts in favor of the buyer. (Emphasis added). 190 F.2d at 822.

That being the rule in the case of a clearly expressed disclaimer a fortiori, language which is not ambiguous and not plainly contrary to the warranties stated cannot be given effect.

We invite the court's attention also to the language in Berk v. Gordon Johnson Company, E.D.Mich.1964, 232 F.Supp.682, at 686 and 687 wherein the court stated:

Assuming for purposes of the motion that the drawing is part of the contract, and that the words 'Kosher operation' on the drawing are an express warranty of fitness, the court must resolve the inconsistent clauses in the contract against the disclaimer of warranty if the

* * *

No cases appear to hold that an express warranty in a contract is cancelled by an express disclaimer of warranty in the same contract. Indeed, Differential Steel Car Co. v. McDonald (Ca 6, 1950, 180 F.2d 260, suggests otherwise).
Emphasis added.

The court went on in Berk to apply rules of contract construction favoring plaintiff to resolve the conflict, including:

Finally, to the extent that a contract is susceptible of two constructions by reason of doubt as to the meaning of ambiguous language, it is to be construed most strongly against the party by whom the ambiguous language is used. 232 F.Supp. at 687.
(Emphasis added).

That is also a rule of construction in Montana. Voyta v. Clonts, 134 Mont. 156, 166, 328 P.2d 655, 661 (1958); United States Bldg. & Loan Ass'n. v. Gardiner, 87 Mont. 586, 591, 289 Pac. 555 (1930); cf. Section 13-720, Revised Codes of Montana, 1947.

See also the landmark decision of Henningson v. Bloomfield Motors, supra, 32 N.J.358, 161 A2d 69, 75 ALR2d 1:

As to disclaimers or limitations of the obligations that normally attend a sale, it seems sufficient at this juncture to say they are not favored, and that they are strictly construed against the seller. 75 ALR2d at 14.

C.F. & I. prepared and distributed PC 955 (Ex.1) knowing that its 270 K strand would be used for hold down devices and employed under heavy tension in prestressing operations. (R.A. 231). C.F. & I. knew also that it could only be so used by employment of standard wedge grips and referred to them in its literature. It is in that context that C.F. & I. purported to "provide complete information on the physical properties of

the strand and warranted it to be capable of bearing a load of 31,000 pounds in the strongest and most unequivocal language possible, i.e., minimum Breaking Strength of Strand--31,000 pounds. It must now be held liable for the consequences of the failure of its product to measure up to that statement. The result required is set forth in Mannsz v. MacWhyte Co., 3 Cir. 1946, 155 F.2d 445 involving wire rope. There a manual issued by the manufacturer contained tables of "approximate breaking strength", language even weaker than the "minimum breaking strength." warranted by C.F. & I. The court made the following statement:

The representations of the manual as to the tensile strength of the wire rope of the size purchased by King were binding on MacWhyte. If King was killed and Ellis was injured because the wire rope broke, having been subjected to less strain than that set forth in the table of tensile strengths, the plaintiffs would be entitled to recover by way of breach of express warranty provided the wire rope was used by King for a purpose intended by MacWhyte. (Emphasis added).
155 F.2d at 46.

C.F. & I. admitted an express warranty of 31,000 pounds.

In the face of the language of its literature, the warranty could hardly have been denied. The C.F. & I. strand broke "having been subjected to less strain than that set forth in the table 3 of minimum ultimate and Breaking Strength of Strand 7. . . ." The Jacobson family is entitled to recover for breach of an express warranty. Hanson v. Firestone Tire & Rubber Company, 276 F.2d, 254, 257 (1960).

THE TRIAL COURT ERRED IN FAILING TO IMPOSE LIABILITY UPON C.F. & I. FOR BREACH OF IMPLIED WARRANTY AND UNDER THE DOCTRINE OF STRICT LIABILITY AND TORT.

The same evidence which entitles the Jacobson family to recover from C.F. & I. for breach of express warranty, also entitles them to recover under an independent, though related theory of breach of implied warranty and strict liability in tort.

Independent of contract or statute, the weight of modern authority implies warranties that C.F. & I.'s prestressed concrete strand was and is reasonably suitable for use as such and is of merchantable quality. Those implied warranties were breached by the failure of C.F. & I. 270 K strand during the prestressing operation. See Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A2d 69, 75 ALR 1, 20; Dagley v. Armstrong Rubber Company, 7 Cir. 1965, 344 F.2d 245; B. F. Goodrich Co. v. Hammond, 216 F.2d 501, 504 (1959);

These implied warranties have been recognized with respect to all types of products. See Chairaluce v. Stanley Warner Management Corp., 236 F.Supp. 385 (1964); Nichols v. Nold, 174 Ka. 613, 258 P.2d 317; Hart v. Goodyear Tire & Rubber Company, 214 F.Supp. 817 (1963); Jakubowski v. Minnesota Min. & Mfg., 193 A2d 275 (1963). These and other authorities were reviewed in more detail in plaintiffs' post trial brief reproduced in the record. R.A. 139-142

The Jacobson family is also entitled to recover under the related doctrine of strict liability in tort as stated by the American Law Institute in Section 402 A, Restatement Torts, Second.

That provision is as follows:

§402 A. Special Liability of Seller of Product
for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The crux of that statement is that one who sells any product in a defective condition unreasonably dangerous to the user or consumer is liable for physical harm thereby caused to the ultimate user or consumer. The Jacobson family submits that Type 270 K prestressed concrete strand of the 31,000 pound minimum breaking strength grade is defective if it will not in fact withstand that tension. The evidence proved that it would not. Tr. 147

A full discussion of modern authorities construing and applying the doctrine of strict liability in tort is set forth in plaintiffs' post trial brief in the record on appeal. We

invite the court's attention to that statement without prolonging this brief by repeating it here. See R.A.143-146.

The trial court erred in failing to recognize that C.F. & I. breached the duties imposed upon it by law under the doctrines of implied (tort) warranties and strict liability in tort.

: THE DENIAL OF PLAINTIFFS' MOTION FOR NEW TRIAL WAS AN ABUSE OF DISCRETION.

After receiving the original findings of fact and conclusions of law of the trial court, the plaintiffs moved for a new trial or in the alternative a reopening of the evidence to permit proof on the insulation of C.F. & I. by virtue of the assumed knowledge of Mr. Young. The motion was supported by the affidavits of Mr. Young and his supervisor at United Prestress, Inc., Mr. Pappin. The affidavits go to the knowledge of Mr. Young, his lack thereof and his lack of participation with or right of supervision over Mr. Swenson. They corroborate the fact, already clear in the record, that Albert Young had absolutely nothing to do with DeRay Jacobson's death.

No part of the "insulation" theory had been tried, briefed or argued by the parties prior to the initial decision. Plaintiffs felt that this might account for the error into which the trial court fell. At that stage, with little effort because there was no jury, the unjust result caused by unwarranted confusion of Albert Young with the role played by Floyd Swenson could have been set right.

The trial court denied the motion and refused further evidence in a short opinion stating "It was not the design of the member, but rather the design and use of the hold down device which caused the trouble". This, as we have previously pointed out in this brief, was contrary to the evidence showing that

Swenson did indeed calculate and design the hold down force in the context of his close familiarity with the hold down device. He would not have designed the lethal load had C.F. & I. furnished a proper warning in its literature. But aside from that error, the trial court's order furnished no answer to the errors pointed out in the motion for new trial.

First the trial court held C.F. & I. "insulated" by the assumed knowledge of Mr. Young as to the size or number of hold down strands necessary. When we pointed out that he did not have such knowledge, and if he had, it would not have helped because Mr. Young was not involved in the decision of the force to be imposed on the hold down, the trial court went to the design of the hold down hardware itself. But there was nothing unique about it. Tr. 428. It was simply a method of tensioning strand utilizing standard wedge grips referred to in the C.F. & I. literature. Mr. Swenson was very familiar with it. This hardware and the manner in which it was employed was among the many constant factors which Mr. Swenson considered in every design he turned out. He knew how it operated, that it imposed the force on to a single strand of 270 K, and he assumed that it would sustain a 31,000 pound load based on the data published by the defendant. C.F. & I. also knew the United Prestress system.

When and by whom the hold down hardware was designed

therefore just is not important to the case. It was a factor that all parties were aware of before the day Mr. Jacobson died. There is no justification for imposing its shortcomings, if any, exclusively upon the plaintiffs. They, at least, are not the designers of the equipment nor was DeRay Jacobson. Mr. Swenson in doing his work in calculating the force in the hold down necessarily assumed the existing equipment just as he assumed the existing casting bed, forms, concrete and strand. If the hold down was ill designed to use with 270 K strand, or if 270 K strand should not have been used as a hold down without additional safety precautions, C.F. & I., knowing about these things, should have said so.

In addition to the design of the hold down device, the trial court indicated that its "use" was a part of the cause of the trouble. DeRay Jacobson certainly used the device in the physical sense but he did not decide where, how, or to what depth of depression he was going to use it. He did not determine the tension he was going to achieve from use of the hold down. These things were determined by Floyd Swenson and in this sense, Swenson was the "user". Again therefore any knowledge Albert Young may have had was unimportant and remained unconnected with DeRay Jacobson's death.

All DeRay Jacobson did was furnish the hands which were guided by Floyd Swenson. Floyd Swenson determined the position of the hold down and the extent of the load it would have to

withstand guided by the literature of C. R. M. 1957, 1961.
exaggerations and gross inadequacies of that literature brought
about the tragedy.

Accordingly the trial court's reasons do not justify its
denial of the post trial motion. Inasmuch as the issues upon
which the case was decided were not tried, argued, or briefed
and in view of the obvious lack of support both in law and
in fact, for the result reached, the denial of the plaintiffs'
motion was an abuse of discretion.

For the same reasons set forth in this brief directed to
the reversal of the trial court's judgment, if this court does
not direct the entry of judgment for the plaintiffs the case
should be remanded for a new trial on all or part of the issues.

CONCLUSION

On the theory of negligence the trial court's Finding of Fact XIV compels entry of judgment for the Appellants. The negligent misrepresentation contained in C.F. & I's Bulletin PC 955 and its failure to give adequate or any warning of the limitations of 270 K strand when used as a hold down strand as defendant knew it would be, struck down DeRay Jacobson in the prime of life. His family has suffered manifest injustice on the basis of knowledge ascribed to an engineer totally unconnected with his death. Montana law imposes joint and several, if not sole, responsibility for that death on C.F. & I.

Under any view of the facts the trial court's interpretation of Section 388 of the Restatement of Torts, Second, abrogates the very duty to warn therein stated. Under the Restatement C.F. & I. owed a duty to warn DeRay Jacobson through Floyd Swenson of the hazards of using the strand as a hold down at loads within its specified strength which C.F. & I. later admitted were not safe. Having supplied misleading information couched in strongest possible language and with knowledge of the technique utilized at United Prestress to employ the strand, C. F. & I. chose not to deliver a warning. As it had ample reasons to realize, United Prestress, Swenson and Jacobson were unaware of the dangers involved at the loads 270 K strand was regularly being used as a hold down, subdivision (b) of Section 388 of the Restatement was satisfied. Thus C.F. & I. is liable under

Section 338 independently of Montana law applicable to the case.

C.F. & I. must also be held liable on the theory of breach of warranty. The breach is established by the evidence and trial court's finding of strand failure at less than 31,000 pounds, the "minimum ultimate strength" and "Breaking Strength of Strand" in minimum pounds warranted by the C.F. & I. sales literature. The warranties could not have been stated in stronger language. The trial court's construction of the literature cannot be reconciled with that language, the organization of the literature, or its plainly expressed meaning; and it is not consistent with the rules of construction the court was bound to follow.

If there can be any doubt as to the meaning of "minimum ultimate strength" C.F. & I. removed it by stating "Breaking Strength of Strand Min.Lbs. 31,000". C.F. & I. cannot now urge it meant something other than what it said at the expense of the family of the man those words killed.

Judgment should be reversed with instructions to the district court to determine damages and enter judgment for plaintiffs.

RESPECTFULLY SUBMITTED this 19th day of December, 1967.


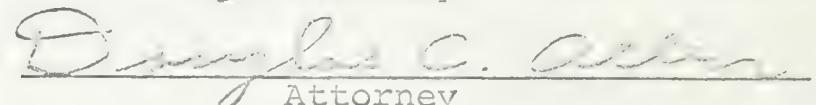

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CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.


Attorney

Attorney

CERTIFICATE OF SERVICE

I certify that on this 19th day of December, 1967, I served three (3) copies of the within and foregoing brief of Appellants upon Joseph R. Marra, Esq., Attorney for Colorado Fuel and Iron Corporation, a corporation, Appellee, by delivering them to him personally at his office in Great Falls, Montana.


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BRIEF OF APPELLEE

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

No. 22322

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON, his next friend, and PRISCILLA J. JACOBSON, by MILDRED J. JACOBSON, her next friend,

Appellants

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

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INTRODUCTORY STATEMENT

This is a wrongful death suit allegedly based upon the law of products liability. Plaintiff asserted liability in negligence, express warranty, implied warranty and strict liability.

The Defendant, CF&I, manufactured and sold a steel strand designated as 270K grade to the decedent's employer, United Prestress, Inc., which used the strand in the manufacture of prestressed concrete members. On October 1, 1964, United Prestress, Inc., was fabricating two 90 foot T-beams in a prestressed concrete bed. There were 22 strands, more than 180 feet long, stretched and pretensioned horizontally at various heights across the bed. These were to be pulled down in a jacking device and held down at each of four "hold-down" points by a single piece of the same strand about seven feet in length. One of these short pieces of strand used at one of the "hold-down" points broke while it was being used to pull down the pretensioned horizontal strands causing the horizontal strands to be released like 22 great bow strings which in oscillating caused injuries resulting in the death of the plaintiff's decedent.

ARGUMENT

The Plaintiff asserted, but did not prove, that the strand was defective, and as a matter of fact, the

only proof is that the strand was not defective.

Stephen Teleshak, the Metallurgical Engineer, Manager of the Metallurgical Department of the Pittsburgh Testing Laboratory (T.300), an independent testing laboratory (T. 408), who examined and tested the strand that broke, and a strand from the same reel (T. 348, 349, 350), testified that he had "no doubts whatsoever" that the strand was not defective (T. 407) and that the strand that broke met and exceeded the Minimum Ultimate Strength Specifications of 31,000 pounds (T. 324, 325, 326) as represented in defendant's bulletin (P's Ex. 1).

Plaintiff's expert Dr. Arthur A. Anderson, admitted that he could not state that the strand which broke had a minimum ultimate strength of less than 31,000 pounds (T.168) or that the strand was defective (T. 172). The record clearly shows that any one or more factors in combination could have caused the strand to break.

Plaintiff's expert admitted that he probably would not have used only one hold-down strand (T. 160, L. 13-17). Plaintiff's witness, Albert Young, an Architectural Engineer in charge of United Prestress's prestressing operation (T. 6, L. 4-6), testified that in this instance he would have used two hold-down strands (T. 37, L. 18-21); that he recommends that 18,000 pounds theoretical tension not be exceeded (T. 38); that on this particular

day the theoretical tension exceeded the tension he would recommend for one hold-down strand (T. 38, L. 9-19).

Plaintiff's witness, Harry Knight, Plant Superintendent at United Prestress, testified that the shop drawings usually contain the number of pounds of tension to be put on the hold-downs but that the shop drawings on this day did not contain the number (T.119, L. 23-25; T. 120, L. 5-20). It is clear that the workmen engaged in the actual fabrication of the concrete members, from Mr. Knight on down, worked from plans furnished them by the technicians, (T. 210, 212, 214, 216, 225, 226, 227, 91, 92, 119, 120) and that since the workmen proceeded with the fabrication of the concrete member despite the absence of such information, tension on the hold-down strand was a factor which was simply not taken into consideration on the day of Mr. Jacobson's death.

H. Kent Preston, whose deposition plaintiff introduced in evidence as Exhibit 11 (T. 269), Civil Engineer, (P's Ex. 11, Pg. 8, L. 14-15) under whose supervision this particular strand was developed, testified that it is standard procedure to use a safety factor of two and that the tension in the strand when used as a hold-down should not exceed 50% of its ultimate strength (P's Ex. 11, Pg. 21, L. 13-23).

Jack Janney, the Independent Consulting Structural Engineer, and an expert in prestressed concrete (T. 409,

410), testified that a knowledgeable engineer would not use one hold-down strand in a hold-down device such as the one used here (T. 425, L. 16-20) and he also stated he would recommend at least a safety factor of two (T. 425, L. 21-25; T. 426, L. 1-9), and that under the circumstances here, the safety factor per se was less than one (T. 454, L. 5-13).

All of the experts and professional witnesses, therefore, whether they testified on behalf of the plaintiff or the defendant, stated that they would not have used a single hold-down strand in the device which was used on October 1, 1964.

Albert Young, Chief Technician and Engineer at United Prestress, Inc. (T. 29, 30), testified that he had instructed Harry Knight, the Plant Superintendent, to deflect in increments (T. 31, L. 13-16) to reduce the friction (T. 32, L. 10-17). Harry Knight admitted that each of the beams were deflected all the way on this particular day (T. 121, L. 9-17) in violation of those instructions.

Arthur Dешner, Mr. Jacobson's co-worker, admitted that after the accident they did deflect in increments (T. 233, L. 20-21), but that before the accident they didn't. He admitted that now they are deflecting all the way as they did before Jacobson's death (T. 234, L.

1-3) because it is easier (T. 234, L. 14-22) and the accident is no longer so fresh in his mind (T. 235, L. 18-23).

Albert Young testified that it is proper to use the gauges on the hydraulic pumps to "double check" the force at each hold-down point to determine whether the stress is proper or exceeds the calculated stress (T. 35, L. 13-21). Harry Knight testified that there were gauges on the hydraulic pumps that day but he did not believe they were being used (T. 118, L. 22-25; T. 119, L. 1).

Arthur Deshner testified he didn't remember whether there were any pressure gauges or not but he did know that they didn't use them (T. 233, L. 4-8). The evidence is clear that no one was concerned with the tension on the hold-down strands that day.

Stephen Teleshak testified that misalignment, eccentricity and non-uniform loading can cause premature failure (T. 315, 316), because if the strand is not perfectly plumb in the chucks the load may be translated on one or two wires rather than uniformly (T. 317).

Jack Janney illustrated the effect of this differential grip bite with the notched paper illustration, showing that if the non-notched side is gripped, the paper is strong, but if the notched side is gripped, it is very weak and tears easily (T. 467). Jack Janney also

testified that this type of a hold-down device is well-known to reduce the breaking strength of the strand by a considerable amount because it is necessary that everything be lined up carefully (T. 419, L. 21-25; T. 420, L. 1-8). Albert Young testified that it would be impossible to have perfect alignment in this particular jacking device (T. 48, L. 25; T. 49, L. 1-4).

Harry Knight testified that the strand is not plumb in this device (T. 114, L. 21-25; T. 115, L. 1-17). H. Kent Preston testified that misalignment causes a great reduction in the efficiency of the strand (P's Ex. 11, Pg. 16, L. 25; Pg. 17, L. 1-3). Even Doctor Anderson finally admitted that there was correlation between misalignment and breaking strength, (T. 179, L. 7-15); and that the teeth in the chucks bite into the strand like pliers (T. 175, L. 5-13).

Doctor Anderson also testified that anyone with a technical background such as the man who designed this system, would know that you couldn't expect to develop the ultimate strength of the strand in a Supreme Chuck (T. 165, L. 23-25; T. 166, L. 1-14).

Jack Janney also testified it certainly should be common knowledge for an engineer to know that you couldn't develop 31,000 pounds minimum ultimate strength in a strand chuck (T. 424). Doctor Anderson also testified

that a variety of factors could influence the strength of the strand as contrasted with its ultimate strength such as foreign matter between the inner surface and the outer surface, the degree of lubrication and the eccentricity of the pull. (T. 187, L. 4-23). Impact force, if the strand is loaded rapidly, can drastically reduce the strength of the strand (T. 463, L. 14-20), and the testimony is that there was a jump or sudden movement and then another movement like it. (T. 244, L. 17-25).

The manufacturers of the Supreme Chucks also published charts (P's Ex. 3) which were tacked around the shop for the men to see (T. 41, L. 13-24), which charts warned that it is "imperative" not to hammer or nick the chucks (T. 44, L. 17-20). It is clear that Etzweiler, another workman, was hammering this chuck with a home-made fork hammer made out of rod-iron (T. 245, L. 13-21). He testified that now "after Jake died", they've stopped using it. (T. 237, L. 13-23). The same literature instructs that the chucks should be properly lubricated (T. 46, L. 5-17). Doctor Anderson testified that this was one of the factors which could influence the strength of the strand as contrasted with its ultimate strength (T. 187, L. 4-25) and yet there is no evidence that the chucks were lubricated or with what they were lubricated at United Prestress on the day of Mr. Jacobson's

death.

The literature also agrees with the experts testimony, and cautions to be sure that the strand is pulled in a straight line (T. 48, L. 3-11). It is clear therefore, that the trial court's Finding of Fact number VII that there is "no evidence" of "manufacturing defects" and Finding of Fact XI that "in the light of all of the possible combinations of factors which might have caused the hold-down strands to fail" the "plaintiffs have not met the burden of proving that the strand was defective or negligently manufactured" are supported by the evidence.

The plaintiffs are now contending that the defendant's bulletin (P's Ex. 1) represented to Mr. Floyd Swenson, the engineer who designed the T-beam, that its strand can bear a load of 31,000 pounds under any and all circumstances or uses.

Defendant's bulletin states that its strand will develop "a percentage of its ultimate strength" comparable to that of ASTM grade in a casting bed. It further states under the heading SPECIFICATIONS that "type 270K strand shall be fabricated and tested in accordance with the requirements of ASTM A416-59T". The defendant thus represented that type 270K grade strand has a Minimum Ultimate Strength of 31,000 pounds under

the described testing methods.

An examination of the bulletin itself discloses that it was prepared for technically informed people in the prestressed concrete industry. As H. Kent Preston testified, the strand is ordered through the catalog (bulletin) provided by the defendant, which contains the specifications and the strand must conform to those specifications (Ex. 11, Pg. 11, L. 13-25; Pg. 12, L. 1-6). Albert Young testified that he used the bulletin to buy the strand because it comes up to certain specifications which are common knowledge in the industry (T. 60, L. 6-25; T. 61, L. 1). Floyd Swenson has a Master's Degree in Engineering, (T. 62) and testified that he used the bulletin and understood what ASTM grade meant (T. 80, L. 8-22). He testified:

Q. Now, there was handed to you a moment ago Plaintiff's Exhibit 1 which is entitled "CF&I Roebling Type 270K Prestressed Concrete Strand Specifications and Physical Properties. Is that right?"

A. Yes, sir.

Q. That refers, does it not, to ASTM grade strand, is that correct?--does that mean something to you?

A. It sure does.

Both Doctor Anderson and Jack Janney, Plaintiff's and defendant's experts respectively, testified that it is common knowledge to an engineer that 31,000 pounds

load cannot be developed in a Supreme Chuck (T. 166, 424, L. 9-15; 425, L. 16-20; 464, L. 22-25; T. 465, L. 1-2). Teleshak, the Metallurgist, produced a copy of the ASTM specifications A416 from which he testified (T. 327), to which specifications the bulletin repeatedly refers, and Teleshak testified that ASTM tests are conducted with "fitted slip limiting grips" (T. 334, L. 7-12), and not with Supreme Chucks or wedge grips of the type used in a prestressed concrete bed. Not one of the witnesses testified, including Mr. Swenson, that they expected the strand to develop its Minimum Ultimate Strength of 31,000 pounds in a prestressed concrete bed. It is clear from the evidence that those who used the bulletin understood what ASTM meant and what Minimum Ultimate Strength under ASTM A416 meant.

The term Minimum Ultimate Strength simply means the minimum number of pounds at which the strand will break in the absence of mechanical damage (T. 167, 168, 313, 333, 334, 335, 423, 424). As a matter of fact, if, during a test to determine the breaking strength of a piece of strand, the strand should fail in the gripping device of the testing apparatus, the test would be unsuccessful (T. 167, 168, 313) because it might have broken as the result of mechanical damage caused by the gripping device.

Ideally, a breaking strength test would result in a series of tensile breaks in the individual 7 wires of which the strand is composed as distinguished from sheer type fractures, the latter resulting from mechanical damage to the strand (see figure 6, P's Ex. 5).

The above described testing procedure was formulated by the American Society for Testing and Materials (T. 80), and an understanding of the test to determine breaking strength or minimum breaking strength would necessarily carry with it an understanding that the concept excludes the possibility of mechanical damage (T. 333, 334, 335, 336). Mr. Albert Young and Mr. Floyd Swenson, the two engineers and technical personnel working at United Prestress, Inc., at the time of the accident, understood the testing procedures utilized in measuring the specifications and physical properties of the strand (T. 60, 80). Young testified that the meaning of the information contained in Plaintiff Ex. 1 (the bulletin) is a matter of "common knowledge***in the industry" (T. 60). The bulletin which outlines the "SPECIFICATIONS AND PHYSICAL PROPERTIES" of the strand, is, by its very terms, addressed to technicians who understand the concepts employed in describing the product and measuring the qualities (T. 464, 465). The cause of the failure of the strand employed in the

particular hold-down device used that day was mechanical damage, caused, in whole or in part, by the gripping action of the Supreme Chucks used in the hold-down device (T. 305, L. 23-25; T. 306, L. 1-4; T. 307, L. 17-25; T. 308, L. 1; T. 309, 310, 311, 312, 313), as well as all or some of the other possible combinations of factors heretofore referred to. It is a matter of common knowledge among technicians in the prestressed concrete industry, to whom defendant's bulletin was addressed, that it is not possible to develop the full strength of a piece of strand by employing gripping devices such as Supreme Chucks because of the effect of mechanical damage (T. 165, L. 23-25; T. 166, L. 1-14; T. 419, 424).

Plaintiff's brief, P. 33, 43, states that the defendant, through its agents, knew the manner in which its strand was used at United Prestress having observed the hold-down techniques. Albert Young testified that he knew that the defendant's salesmen weren't engineers capable of giving advice (T. 61), and as a matter of fact, testified, when asked by the attorney for the plaintiff whether the safety factor employed by him had ever been suggested by CF&I replied:

"I would say that this would be beyond their scope to suggest this and I am sure that it wasn't suggested by them." (T.201).

Floyd Swenson testified he didn't know whether

they were engineers or not (T. 84, L. 10-18). Further, there isn't any evidence that any of these salesmen knew how many hold-down strands were being used on the job that day and Swenson testified that it was the first member that he had ever designed "exactly" like this one (T. 80, L. 4-7), so that the salesmen, even if they had been technically qualified, never had the opportunity to advise.

Another contention made by the plaintiff is that the bulletin should have warned of the limitations when the strand was used as a hold-down strand. Swenson testified that the strand could be used for many configurations (T. 85, L. 4-5); Preston testified (Ex. 11, Pg. 14, L. 17-25; Pg. 15, L. 1-2) that there are many types of hold-down devices employed by various operators of prestressed concrete plants and defendant could hardly be expected to anticipate all of the possible types of uses to which the strand might be put. The defendant, therefore, did the only thing it could reasonably do in its bulletin. It gave the specifications and the physical properties of the strand and the ASTM designation so that the engineers who bought and used the strand would know the testing methods employed and what they were dealing with.

The trial court's finding that the persons required to have knowledge of the stress generated in the operations, the adequacy of the design of the casting bed and the hold-down devices were the technicians, is supported by the evidence.

The evidence established unequivocally that the workmen engaged in the actual fabrication of the concrete members, from Mr. Knight on down, are concerned only with distances and work from plans furnished to them by the technicians (T. 210, 212, 214, 216, 225, 226, 227, 91, 92, 119, 120).

The trial court's finding of fact that:

"On at least three prior occasions, and perhaps more, United Prestress had failures of hold-down devices. An engineers named Swenson, designed the T's which were being made, but he did not design the hold-down device, and there is no evidence as to his knowledge of the adequacy of the hold-down devices which used one strand of 270K. Young, superintendent of the plant and the chief technician, knew that two strands, or a strand larger than 7/16 inch should have been used in the operation in question and that one strand should not be used where the tension exceeded 18,000 pounds. From the testimony the court is of the opinion that Young had this knowledge prior to the accident..."

is supported by substantial evidence.

The evidence established the existence of a number of hold-down strand failures prior to the accident

1. The first part of the paper is devoted to a general discussion of the problem.

The second part is devoted to a detailed analysis of the various aspects of the problem.

The third part is devoted to a detailed analysis of the various aspects of the problem.

The fourth part is devoted to a detailed analysis of the various aspects of the problem.

The fifth part is devoted to a detailed analysis of the various aspects of the problem.

The sixth part is devoted to a detailed analysis of the various aspects of the problem.

The seventh part is devoted to a detailed analysis of the various aspects of the problem.

The eighth part is devoted to a detailed analysis of the various aspects of the problem.

The ninth part is devoted to a detailed analysis of the various aspects of the problem.

The tenth part is devoted to a detailed analysis of the various aspects of the problem.

(T. 42, 229). That finding of fact is uncontroverted.

The court's Finding of Fact that Mr. Swenson did not design the hold-down device is uncontroverted (T. 83, L. 13-15).

The court's finding that there is no evidence as to his knowledge of the adequacy of this particular hold-down device is supported by the evidence because Mr. Swenson merely testified that he was familiar with the hold-down device (T. 83) and there is no evidence that he either directed the use of one single 7/16 inch strand in the hold-down device or that he was aware that a single strand hold-down device was to be used at each hold-down point. Indeed, the evidence demonstrates that Mr. Swenson did nothing more than prepare the design calculations. He did not even prepare the shop drawings which were drawn by a third party named Ron Nybo, which drawings on this day didn't contain the pounds pressure at the hold-down point as they usually did (T. 85, L. 23-25; T. 86, L. 1; T. 119, L. 23-25; T. 120 L. 1-20). This point is significant, because, as Mr. Young's testimony indicates, the design of the hold-down device was not faulty. On the contrary, an adequate margin of safety can be provided for by the use of a larger strand in the hold-down device or by the use of two strands and two devices at each hold-down point (T. 37). Thus, Mr.

Swenson's familiarity with the nature of the hold-down device, in addition to his knowledge of the theoretical tension to which the hold-down device was subjected, does not constitute evidence as to the adequacy of the hold-down methods employed on the day in question.

The finding of the trial court that Mr. Young was the superintendent of the plant and the chief technician at the time of the accident is supported by substantial evidence, despite Appellant's assertions to the contrary.

Mr. Young testified that at the time of the accident he was "Production Coordinator" and that his duties included sales and engineering (T. 5, L. 19-25). Although his testimony that he was chief technician and engineer may have related to the time of the trial (T. 29, L. 23-25; T. 30, L. 1-25; T. 31, L. 1-2), he testified that at the time of the accident he was superior to Mr. Knight, the plant superintendent, that he gave instructions to Mr. Knight; that he had discussed deflecting procedures with Mr. Knight prior to the accident; that he had advised the men with respect to safety around the United Prestress plant; that he had been employed by United Prestress for as long as it had been in existence (approximately four years) and had been employed by its predecessor Pappin Prestress Concrete

(T. 5). Mr. Swenson on the other hand, had been employed by United Prestress only from November of 1963 and no evidence was introduced to the effect that he acted in a supervisory capacity over the men.

The trial court's conclusion that the Appellant's failed to sustain the burden of proof with respect to the "duty to warn theory" is correct.

The trial court's conclusions of law are based upon the obvious fact that liability cannot be predicated upon a failure to tell a person something he already knows, Anno., 76 A.L.R. 2d 9 at 28 (1961); Restatement, Torts 2d, Section 338(b); and, hence, where the use of a product is to be directed by technicians having knowledge of the characteristics of the product, liability cannot be based upon the failure to warn of dangers, knowledge of which necessarily results from a knowledge of the nature and characteristics of the product.

Hopkins v. E. I. DuPont DeNemours & Company, 212 F.2d 623 (3rd Cir. 1954); Marker v. Universal Oil Products Co., 250 F.2d 603 (10th Cir. 1957); Parker v. State, 105 N.Y.S. 2d 735 (Ct. Cl. N.Y. 1951); Harper v. Remington Arms Co., 280 N.Y.S. 862 (Sup. Ct. 1935); Rosebrock v. General Electric Company, 140 N.E. 571 (N.Y. 1923); See also Johnson v. Buckley, 317 F.2d 644 (5th Cir. 1963). For example, in Parker v. State, supra, which was a wrongful

death suit against the State of New York, which had sold blood plasma to a hospital which, in turn, had administered it to a patient who died from jaundice, the court stated:

"It is also urged that the State was remiss in failing to affix a warning label to the plasma carton. There is no warrant for the assumption that the State had an obligation to instruct licensed physicians in the proper application of therapeutic agents in common use....

"In this case the product distributed was designed for use by physicians. There is a manifest distinction between selling a medical preparation to the public, who may have no knowledge of the dangers attendant upon its use, and making available a preparation to a hospital at its request, whose physicians may be expected to have knowledge of the dangers involved in utilizing the therapeutic preparation ordered by them. Ordinarily, there is no duty to give warning to the members of a profession against generally known risks. 'There need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession.'" 105 N.Y.S. 2d at 740, 741.

In Harper v. Remington Arms Co., supra, the defendant manufactured special high velocity shotgun shells designed for the sole purpose of testing weapons, and the plaintiff was given a box of those shells by a friend. The friend, in turn, had received the shells from an unnamed third party and no evidence was presented as to where the third party had obtained them. In his suit

against the defendant, the plaintiff alleged the warning on the box of shells was inadequate. In answer to that contention, the court used the following language:

"The use of the words 'proof load' and 'Remington Proof Load 7.5 Tons pressure' on the shells and the printing on the label affixed to the top of the cover of the box in the case at bar would unquestionably be sufficient notice to arms manufacturers and dealers in shells for arms manufacturers of the danger and character of the shells. Undoubtedly, to such class of persons nothing further need have been done by the defendant. To them sufficient notice was given, and the active force or risk created by the defendant having come to rest in a position of apparent safety, the court will follow it no longer." 280 N.Y.S. at 868.

Again, in Rosebrock v. General Electric Co., supra, where an issue presented was the question of a manufacturer's duty to warn, the New York Court of Appeals stated:

"...I take it that an instrument which may be dangerous and is generally known to the electrical profession as a danger need not be warned against by a seller. If, for instance, transformers were usually packed with wood as were these, and the electrical trade or experts should have known that such packing was usual and that danger would arise unless the instrument was examined and packing removed, then in such case the General Electric Company would not be negligent in shipping to electric companys or experts the transformers without any instruction or caution..." 140 N.E. at 574.

Finally, in Marker v. Universal Oil Products Co., supra, another wrongful death suit where the question of duty to warn was presented, the court disposed of the issue as follows:

"We pass now to appellant's second claim: That Universal had a duty to warn decedent of the danger of entering the vessel when hot catalyst was in use.

"The fact that the use of hot catalyst in the vessel during the process of recharging would create carbon monoxide gas and hence a dangerous condition for workmen lowered into the vessel was equally within the technical knowledge of both Universal and Tidewater. No duty existed upon Universal to warn Tidewater of such a potentiality..." 250 F.2d at 606.

In the instant case, the evidence demonstrates conclusively that the appellee's strand measured up to and exceeded the specifications and physical properties set forth in the appellee's brochure. Mr. Swenson and Mr. Young, the engineers and technical personnel at the United Prestress Plant, were familiar with the appellee's literature and understood fully the scientific concepts employed in describing the material; and therefore were familiar with the fact the actual breaking strength of a piece of strand is a variable factor under field conditions, depending upon various factors creating external stress, such as bending and the gripping action of the chucks, which result in mechanical damage. The expert

witnesses called by both the appellants and the appellee affirmed that this fact was a matter of common knowledge in the prestress concrete industry. The evidence established further that responsibility for design and employment of the hold-down device was reposed, and because of the nature of the industry was necessarily reposed, in the engineers at United Prestress.

The trial court found that Mr. Young was the superintendent of the plant and the chief technician and, as stated above, that finding is supported by substantial evidence. He testified that it was his engineering practice not to exceed a theoretical hold-down tension of 18,000 pounds when using a single 7/16 inch strand on the hold-down device. If we assume, as do the appellant's, that under the United Prestress operation, responsibility for the hold-down device rested with Mr. Swenson, the result would still be the same; the evidence proved that Mr. Swenson likewise possessed the requisite technical knowledge to understand the effect of mechanical damage to the strand, and, hence, the necessity of a safety factor to protect the men.

The trial court, citing Hopkins v. E. I. DuPont DeNemours & Co., supra, held the appellant's had failed to sustain their burden of proving an absence of knowledge on the part of the United Prestress technicians

of the characteristics of the product which necessitated a built-in margin for safety. As the circuit court stated in the DuPont case:

"...the issue of the user's ignorance of danger was one on which plaintiff had the burden of proof." 212 F.2d 623 at 626.

In this case, whether the burden of proof on the issue of lack of knowledge be regarded as residing in the plaintiff at the outset, or with the defendant, the trial court's finding is correct. The defendant, through the testimony of Doctor Anderson, Mr. Janney, Mr. Young, and Mr. Preston (in his deposition), came forward with the evidence and proved that it is a matter of common knowledge that mechanical damage is the necessary result of the use of strand in a hold-down device such as the one employed in the instant case, and the evidence shows that Mr. Swenson was a graduate engineer with a Masters Degree. Either expressly or by necessary implication each of those witnesses testified that a substantial margin of safety to protect the men was employed by them because of their knowledge of the product and its characteristics. On the other hand, the appellants produced no evidence as to the specific knowledge of Mr. Swenson as to the necessity of an adequate safety factor. In view of the fact Mr. Swenson was aware of

the specifications and physical properties of the product, the conclusion is inescapable that, as a graduate engineer, he was necessarily aware of the need for a margin of safety. Assuming Mr. Swenson, and not Mr. Young, were responsible for the hold-down device with respect to the single T-members in question, the fact Mr. Swenson failed to discharge his responsibility is irrelevant to the question of his knowledge.

In short, the evidence demonstrated that (1) the prestressed concrete industry is a technical field; (2) that, although the fabrication of members is dangerous if done improperly, responsibility for avoiding the dangers rests with design engineers and technicians; (3) that a knowledge of the specifications and physical properties of a particular piece of strand is all that an engineer needs to build a margin of safety into his design; and (4) that Mr. Young and Mr. Swenson were made aware, through the appellee's literature, of the specifications and physical properties of the 270K strand in question. Under these circumstances, it is obvious the appellants have failed to sustain their burden of proving Mr. Jacobson's death was the proximate result of negligence on the part of the appellee.

The fact that Mr. Young, or Mr. Swenson, failed to exercise their responsibilities with respect to the

hold-down device in question obviously does not render the appellee a joint tortfeasor, as the appellants suggest. As appellants state on page 36 of their brief, the proximate cause of an injury is defined in Montana as:

"That cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have occurred." McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932) (emphasis added)

See also Restatement, Torts 2d Section 432. In the present case the appellants' contention is that the appellee was negligent in failing to impart certain information concerning its product, and the evidence demonstrates that the only persons to whom such information would be meaningful already possessed the relevant knowledge. The failure to tell someone something he already knows obviously cannot be the proximate cause of damages resulting from the failure of that person to employ the knowledge he possesses.

Appellee is not liable on the theory of breach of an express or implied warranty or upon the theory of strict liability in tort.

What has been said above disposes of the appellants contentions relative to whether appellee is liable on the theory of breach of an express or implied

warranty. The appellee's literature setting forth the specifications and physical properties of the strand was addressed to technicians having the scientific knowledge requisite to an understanding of the concepts employed in describing the material. As Mr. Teleshak testified, the strand did, in fact, measure up to those specifications and thus it is not possible to charge the appellee with the breach of any warranty which might be attributable to the appellee's literature. Furthermore, no privity of contract existed between the appellee and Mr. Jacobson or his family, and since the Montana Supreme Court has not passed upon the question of whether privity is essential to the existence of a warranty, it is submitted the traditional view, that privity is essential, must be deemed the law of Montana. Larson v. U.S. Rubber, 163 F. Supp. 327 (D. Mont. 1958)., so holds.

With respect to the question of strict liability, as the authority cited by the appellants on page 69 of their brief demonstrates, the theory is applicable only when the product is defective. In this case, of course, the plaintiffs have failed to show that the appellee's product was defective.

The denial by the trial court of the appellants motion for a new trial was not an abuse of discretion.

Concerning the appellants' motion for new trial, which was supported by affidavits, it should be noted at the outset that affidavits are relevant only when the motion is based upon matters outside the record. The only extra-record pigeonhole into which the appellants motion might fit would be newly discovered evidence, since there is no indication of any other extrinsic circumstance such as bribery of witnesses, jury misconduct, or fraud.

With respect to a motion for a new trial on the ground of newly discovered evidence, it is settled that:

"...To warrant a new trial the evidence must not have been known to the movant at the time of the trial; and, moreover, the movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search. A party who has failed to evaluate evidence properly and thereby failed to submit it at the trial, or a party who desires to present his case under a different theory in which facts available at the original trial now first become important, will not be granted a new trial."

6A Moore's Federal Practice, Sec. 59.08 (3), p. 3785, 3786.

Thus, it is clear the appellants did not show themselves entitled to a new trial on the ground of newly discovered evidence.

The appellants protestations they were misled

as to the issues cannot be taken seriously in view, among other things, of the trial court's order filed April 12, 1966 which reads, in part, as follows:

"Apart from any warranty problem, does the complaint state a cause of action in negligence? If a manufacturer makes a product knowing its use, knowing that it will be put to that use by employees of a buyer, knowing that a misuse would be dangerous, may the manufacturer be liable if he misrepresents the safe limit of use and the employee relies upon that representation? The negligence here might be in the use of the words rather than the manufacture of the cable." (R. p. 45)

And it is clear the appellants addressed themselves to that issue in their post-trial brief (R. p. 126-131); accordingly, their assertion they were taken by surprise when the trial court applied the principles of Section 388 of the Restatement of Torts 2d and Hopkins v. E. I. DuPont DeNemours & Co., supra, to the facts of this case is transparent.

The only question, therefore, is whether, based upon the existing record, the trial court's findings of fact and conclusions of law were "clearly erroneous" (Rule 52(a), Federal Rules of Civil Procedure), and for reasons set forth above, they were not.

CONCLUSION

The trial court's Findings of Fact and Conclusions of Law are supported by the evidence. There is no evidence that the strand was defective. The strand might have failed as the result of numerous factors. The plaintiffs failed to prove the proximate cause of the breaking of the strand. The defendant did not warrant or represent that the strand would withstand a tension of 31,000 pounds when used in a hold-down device such as was employed in this case.

The evidence conclusively established that the responsibility for the design and the use of the hold-down device, which employed the strand, was reposed, and was necessarily reposed, in the United Prestress engineers.

The evidence established that the United Prestress engineers were, through the defendant's literature, acquainted with the specifications and physical properties of the strand, and such knowledge to an engineer necessarily carries with it an understanding of the factors which can cause a strand to fail and of the need for a margin of safety.

The defendant's literature, was, by its terms, addressed to engineers and technically qualified personnel and, because of the nature of the industry, they were

the only persons to whom such literature would be meaningful. Accordingly, the trial court's conclusion that the plaintiff's failed to sustain their burden of proof with respect to the defendant's alleged negligent failure to warn is undeniably correct; "there need be no warning to one in a particular trade or profession against a danger generally known to that trade or profession".

The trial court properly denied the plaintiffs motion to amend its Findings of Fact and Conclusions of Law because the trial court's findings are amply supported by the evidence and the plaintiffs did not show themselves entitled to a new trial on the ground of newly discovered evidence.

Respectfully submitted this 8th day of February, 1968.

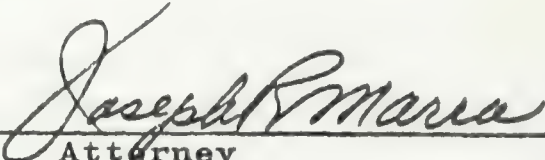
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Attorney

CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 1968, I served three (3) copies of the within and foregoing brief of Appellee upon Cresap S. McCracken and Douglas C. Allen, Attorneys for Mildred J. Jacobson, Basil D. Jacobson, by Mildred J. Jacobson, his next friend, and Priscilla J. Jacobson, by Mildred J. Jacobson, her next friend, Appellants, by delivering them to them personally at their offices in Great Falls, Montana.



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REPLY BRIEF OF APPELLANTS

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NO. 22322

MILDRED J. JACOBSON, BASIL D. JACOBSON, by MILDRED J. JACOBSON,
his next friend, and PRISCILLA J. JACOBSON, by MILDRED J.
JACOBSON, her next friend,

Appellants,

vs.

COLORADO FUEL AND IRON CORPORATION, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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FILED

FEB 27 1958

WM. B. LUCK, CLERK

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ARGUMENT

C.F. & I.'s answer brief is more significant for its omissions than for its content. Comparison of that brief against the subject index of the Jacobsons' opening brief quickly reveals that C.F. & I. has, in the main, not taken issue with the matters advanced by the Jacobsons, any of which should compel reversal of the decision of the trial court. For instance, C.F. & I. has disregarded the questions of liability for its negligent misrepresentations, for its failure, found by the trial court, to give warning of the limitations of its 270 K strand, and it has totally disregarded its breach of the express warranty stated in its literature, 31,000 pound "Breaking Strength of Strand", confining discussion to other portions of its literature.

No effort has been made by C.F. & I. to avoid the fact that its 31,000 pound strand failed under a load which did not exceed 23,250 pounds (Tr. 147-152), or 25,250 pounds according to its expert. (Tr. 440.)

C.F. & I. has tacitly admitted that the trial court relied upon the knowledge of the wrong man, to "insulate" it from liability for its negligence. C.F. & I. has also failed to come to grips with, or even mention, the trial court's Finding XIV (R.A. 231) and the controlling Montana cases of Hopkins vs Ravalli County Electric Co-op., Inc., 144 Mont. 161; 395 P.2d 106 (1964) and Lake vs Emigh, 121 Mont. 87, 190 P. 2d 550 (1948). These cases applied to the trial court's finding XIV compel entry of judgment for the



Jacobson family. See Brief of Appellants, 31-37. This is a confession of the Jacobsons' case.

Rather than respond to the Brief of Appellants, C.F. & I. has urged various propositions as factual, which are completely erroneous, grossly misleading, and in several instances immaterial.

C.F. & I. opens its brief with an argument directed to a non-existent issue in this case, i.e., that the 270 K strand was not defective metallurgically and was not negligently manufactured. Since the Jacobson family has not based this appeal on either a metallurgical defect or negligent manufacture the argument is wholly irrelevant. Aside from that, the argument is largely one of semantics. Obviously 31,000 pound strand is defective per se if it breaks at 23,250 pounds. See Hanson vs Firestone Tire & Rubber Company, 276 F.2d 254 (6 Cir. 1960), and cases cited in Brief of Appellants, 53-54.

After that beginning C.F. & I. speculates from references to widely separated bits and pieces of the record that the failure of its 270 K strand could have been caused by mechanical damage from supreme chucks, or other factors. In the process C.F. & I. has taken considerable license with the record. None of its speculation will stand scrutiny.

On the subject of mechanical damage, C.F. & I.'s expert witness, Stephen Teleshak, acknowledged that failure of the strand so far below its minimum breaking strength cannot be accounted for on this ground. (Tr. 375-378, 397-398; see also Tr. 369-379)



After taking the nicks from the wedge grips into account there is a discrepancy in excess of 5,000 pounds.

The mechanical damage complained of is, of course, from wedge grips utilized in the normal employment of the strand. These are the standard wedge grips referred to in C.F. & I.'s literature, the grips in which the strand is intended to be used. (See Ex. 1) Therefore C.F. & I. is hardly in a position to complain of nicking from these wedge grips.

Be that as it may, Mr. Teleshak concluded in his original report prepared for C.F. & I. (Ex. 4) that the load carrying strength of the three nicked wires on the seven wire strand was reduced about 10%. (Tr. 369, 374) He later wrote a "supplemental" report after a series of correspondence with Mr. Preston of C.F. & I. In that report he stated that the overall load carrying strength of the entire strand was reduced 10% by the nicking. (Ex. 6; Tr. 364, 373)

According to Mr. Teleshak's first opinion, with the load carrying strength of the three nicked wires reduced 10%, the remaining strength of the strand should have been 29,175 pounds. (See Tr. 373-378.) If his "supplemental" conclusion is accepted the strand should have sustained a load of at least 27,900 pounds without failure. However, as pointed out previously, the strand didn't come close to carrying either load and when pressed Mr. Teleshak had to acknowledge that mechanical damage from nicking did not account for the failure. (Tr. 369-379, 397-402)

Another factor speculated upon by C.F. & I. is the matter of

eccentric loading. In urging this as a cause of failure C.F. & I. has inaccurately characterized the record. For instance, while C.F. & I.'s witness Teleshak did testify that misalignment, eccentricity or non-uniform loading, terms which he used synonymously, will cause premature failure, he also testified that in the equipment used by United Prestress such eccentricity was not possible. (Tr. 346.) Dr. Arthur Anderson also testified that the alignment would be "perfectly square, it could hardly be anything else. It had to be perfectly square". Further in regard to the possibility of misalignment, Dr. Anderson agreed with Mr. Teleshak that "this would be impossible". (Tr. 193, 194)

As to the influence of all of the various factors speculated about by C.F. & I., Dr. Anderson ran a series of tests reported in Exhibit 22. To confirm his conclusions, he subjected 270 K strand to the most extremely abusive conditions to which he could subject it. Using the most severe combination of factors C.F. & I. has speculated upon, Dr. Anderson could not induce a failure at a loading anywhere near the low load which broke the strand that killed DeRay Jacobson. C.F. & I.'s brief neglects to mention that, while it purports to argue from the testimony of Dr. Anderson.

Upon all the evidence, Mr. Teleshak, C.F. & I.'s metallurgical expert, concluded that the particular piece of strand in question was overloaded at 23,250 pounds, it simply was not strong enough to withstand that load. (Ex. 4, p. 6, Tr. 402)

Typical of C.F. & I.'s approach to this case, is the statement

at page 7 of its brief, transforming the following fork into a "homemade fork hammer". C.F. & I. then charges that the workman using this implement was hammering on the chuck where the failure occurred. What the record actually contains concerning the function of this implement is the following:

Q. It is necessary to follow along with this U shaped fork to keep those wedges where they belong.

A. That is correct. (Tr. 97)
(Mr. Knight)

Concerning the manner in which he used it, Mr. Etzwiler, the man who was employing this device at the time of Mr. Jacobson's death, said:

A. Well, you can see it, this rod here, I just hold this rod here and the fork fits on top of the cullet here to keep those cullet jaws from getting out of position.

Q. Do you move that cullet.

A. No, then I just keep pushing movement on it. Once in awhile they'll stick and we have to tap it just to get it moving again, to loosen the cullet before the cullet bit into the strand, you know, in case it sticks a little bit, you have got to tap them to get them moving again.

Q. You move it with that object.

A. It just keeps going down with the movement of the ram. (Tr. 255)

The record is clear that the use of this device is to follow the middle chuck, hold it in place and keep its jaws lined up.

(Tr. 97) No "hammering" of the strand or the chuck is involved.

The chuck to which this instrument is applied is the middle chuck

within the steel spacer box, a point remote from the top chuck where the failure occurred. (Ex. 23, Tr. 205) A glance at the picture, Ex. 23, will reveal that there is simply no room to hammer at the chuck inside the steel box, particularly when it is down within the leg of the single T. The assertion that Mr. Etzwiler was hammering is a gross misstatement of the record. But even if he could be said to be "hammering" - he was hammering on the wrong chuck, and at a place remote from the point of failure.

C.F. & I.'s brief continues with similarly transparent inaccuracies which are without record support, but extremely misleading. For example C.F. & I. criticizes the deflection technique, urging deflection should have been done in increments. This would minimize friction that can increase the load on the strand, but the experts took friction into account and made the worst possible friction assumptions against the Jacobson family in calculating the load at failure, 23,250 pounds. (Tr. 146-147) C.F. & I. urges that gauges should have been used to measure the force on the strand, but measurement of elongation, the system actually used, is the most accurate method of measuring force on the strand, and the method preferred by C.F. & I.'s H. Kent Preston, the developer of 270 K strand. (Ex. 11, p. 43) C.F. & I.'s charge that the crew worked without measurements is directly contrary to the testimony of Arthur Deshner, the man who actually used the measurements with DeRay Jacobson and helped him set up the casting bed. (Tr. 209, 210-214.) The charge that Jacobsons



failed to prove the chucks were lubricated is ludicrous. C.F. & I. tried to prove at trial that excessive lubricant in the chucks caused the failure. (See Tr. 53-54) Failing this C.F. & I. has done an about face. In any event, chucks are lubricated so they can be loosened after the strand is tensioned, and a dry chuck has less influence on load carrying strength than one that is lubricated. (Ex. 11, p. 34-35; Tr. 158, 190.)

C.F. & I.'s legal argument is based on the assumption that Floyd Swenson, the design engineer, must have known the limitations of 270 K strand because its bulletin refers to testing requirements of ASTM grade strand - a strand rated 15% weaker than 270 K. The argument springs from C.F. & I.'s reference to language in the "DUCTILITY" paragraph of PC 955 (Ex. 1), and a carefully edited quotation from the SPECIFICATION portion of the bulletin. In the process it has completely emasculated and distorted the bulletin. C.F. & I.'s quotation and supporting statement is as follows:

Defendant's Bulletin states that its strand will develop 'a percentage of its ultimate strength' comparable to that of ASTM Grade in a casting bed. It further states under the heading SPECIFICATIONS that 'type 270 K strand shall be fabricated and tested in accordance with requirements of ASTM A 416-59T'.
/Emphasis C.F. & I.'s./ Brief of Appellee, 8.

Without C.F. & I.'s omission the SPECIFICATIONS paragraph reads:

Type 270 K strand shall be fabricated and tested in accordance with the requirements of ASTM Designation A 416-59 T with the exceptions shown in Table #1, opposite. /Language omitted by C.F. & I. emphasized./ (Ex. 1.)

"Table #1," the exception, plainly states that 270 K 7/16 diameter strand has a "Breaking Strength of Strand," in minimum pounds, 31,000. Further, the bulletin is replete with superlatives extolling the greater strength and virtues of 270 K strand over the inferior ASTM Grade covered by "A416-59 T". Some examples:

Type 270 K, 7-wire uncoated stress-relieved prestressed concrete strand, an important engineering breakthrough recently announced by C.F. & I.-Roebling, has approximately 15% greater strength than ASTM Grade strand. This quality together with its other inherent properties, imparts many distinct advantages to Type 270 K strand - - fewer strands to be handled . . . a larger prestressing force can be placed in a member. . .

With respect to DESIGN LOAD, that function which Floyd Swenson performed in connection with DeRay Jacobson's death, the bulletin provides:

DESIGN LOAD

Six Type 270 K strands will replace seven ASTM Grade strands of the same diameter.

* * *

COST COMPARISON

* * *

Under Design Load it was shown that six Type 270 K will replace seven ASTM Grade strands so we can use 12 Type 270 K in place of 14 ASTM Grade strands.

* * *

For a complete discussion of PC 955 (Ex. 1) and its proper construction see Brief of Appellants, 57-64.

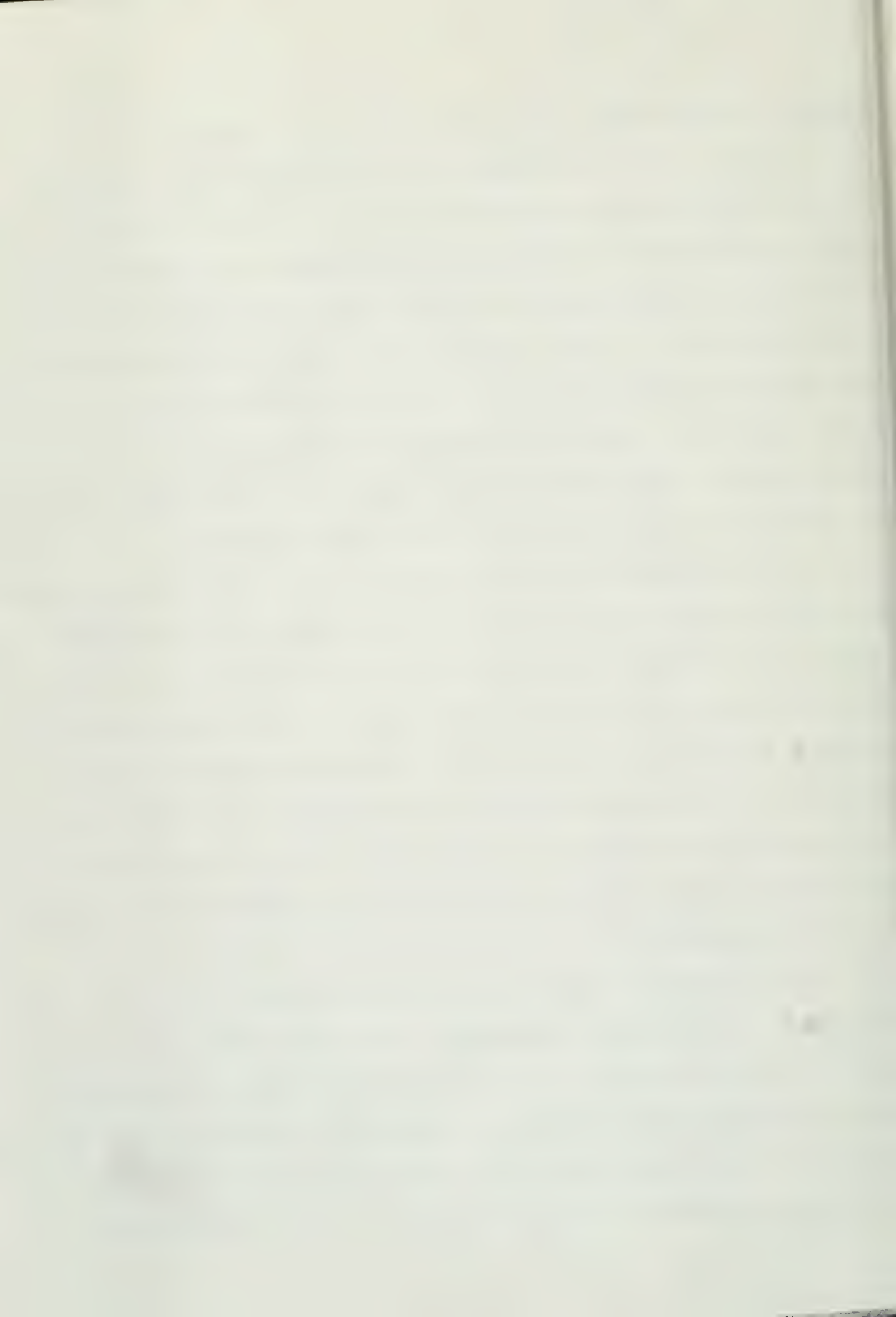
C.F. & I. attempts to demonstrate that Mr. Swenson in fact knew the limitations of 270 K strand, as now admitted by C.F. & I. by omitting significant portions of his testimony and citing questions about the lesser grade ASTM strand. His knowledge on that



subject has also been overstated by C.F. & I. (See Tr. 20-21.)

In fact, the only witness who claimed to know anything at all about ASTM testing procedures, was Mr. Teleshak, C.F. & I.'s expert metallurgical witness. Mr. Teleshak is the witness who did not know what a significant variation in strength of 270 K strand would be (Tr. 387), he could not read the stress strain diagram published by C.F. & I. to show the characteristics of 270 K strand (Tr. 394), he changed his opinion as to cause of failure after corresponding with C.F. & I. (Tr. 364, 369, 371-374), he could not account for over 5,000 pounds of strength loss in the piece of strand that killed Mr. Jacobson (Tr. 379, 398), he denied his own qualifications to speak on the subject of prestressed strand (Tr. 398-399), he couldn't test the strand at the place where it broke (Tr. 406), he didn't test in accordance with ASTM required procedures (Tr. 330-337), and he certified the test specimens to meet the wrong ASTM specification entirely - that for improved plow steel!! (Tr. 367-368). It is on the basis of that testing that C.F. & I. urges its 270 K strand met the irrelevant ASTM standard.

If we ignore the liberties C.F. & I. has taken with the wording of its bulletin, and assume its argument that the bulletin told the design engineer 270 K strand would hold 31,000 pounds less an allowance for mechanical damage from standard wedge grips employed in the casting bed, the knowledge imparted would be that the strand would hold approximately 28,000 or 29,000 pounds.



(Tr. 369-379, 397-402). This therefore was the value Floyd Swenson was entitled to assume, taking C.F. & I. at its word and accepting its present argument and construction of PC 955 (Ex. 1.) The strand in fact failed by more than 5,000 pounds to meet even this compromised standard. This is the same 5,000 pounds for which Mr. Teleshak was unable to account and which he ascribed to "overload". (Tr.). By designing only to 22,500 pounds Swenson left more than that large safety factor, even on the basis of the information, C.F. & I. now claims the bulletin gave to him.

In a nutshell, C.F. & I.'s argument is that the bulletin's reference to ASTM grade strand, and the ASTM testing requirements concerning the lesser grade strand, gave Swenson all of the warnings he needed to design in a sufficient safety factor when using 270 K strand. The fallacy of that argument is demonstrated by the Trial Court's Findings of Fact and Conclusions of Law;

/Finding/ XIV.

The defendant knew that its 270 K strand would be used for hold-down devices although the strand was not furnished specifically for that use. The defendant knew that 270 K strand was employed under heavy tension in prestressing operations, and that strand failures are extremely hazardous. The defendant knew that a single strand of 270 K should not be used in hold-down devices where tensions of more than 15,500 pounds are developed. Defendant's literature did not adequately state the limitation of 270 K strand when used as a hold-down device. /Emphasis added/

(R.A. 231).

/Conclusion/ v.

The defendant's literature did not contain adequate warnings as to the limitations of 270 K strand when used as a hold-down device . . .

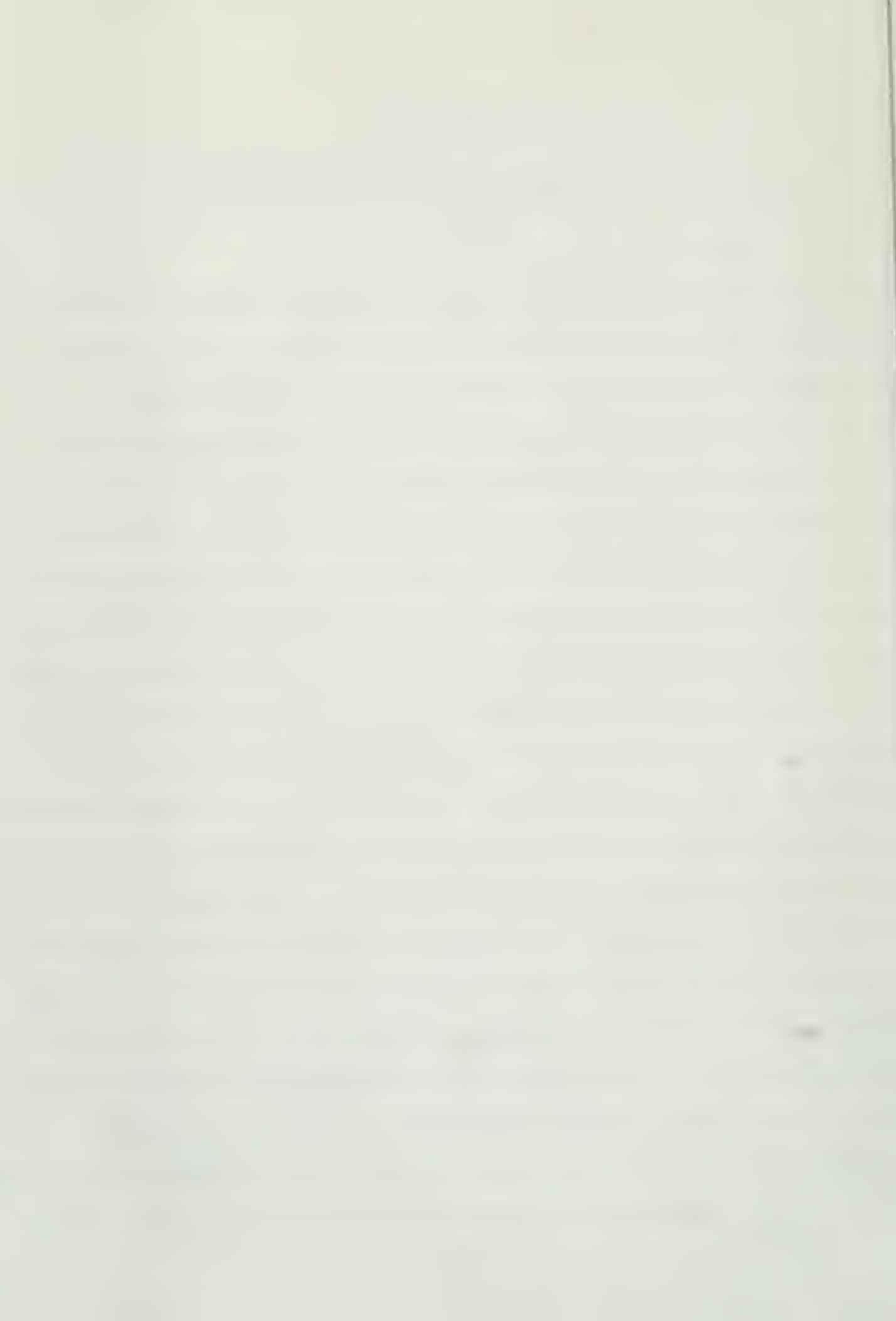
(R.A. 232.)

Since PC 955 (Ex. 1) did not give the design engineer, Floyd Swenson, adequate warnings of the limitations of 270 K strand - - "an important engineering breakthrough recently announced" - - where was he to get the knowledge C.F. & I. now assumes he had?

Contrary to the assumptions repeated in C.F. & I.'s brief, it is clear from Mr. Swenson's testimony that he did not have the knowledge there ascribed to him. That testimony is fully set out at 23-26, Brief of Appellants. Without repeating his testimony here the transcript references are: 64-65, 79-80, 82-83, 85 and 86.

It is clear from both the trial court's finding (XIV) and Swenson's own testimony that he could not and did not have the knowledge now ascribed to him. Since C.F. & I.'s authorities depend for their application upon that knowledge erroneously assumed and ascribed to Swenson, they have no bearing on this appeal.

Error on the part of the trial court is expressly conceded at page 15 of C.F. & I.'s brief, where it acknowledges ". . . the design of the hold-down device was not faulty." The trial court based its denial of the post trial motions upon a contrary assumption. (R.A. 287). In this connection we invite the court's attention to Brief of Appellants, 28-29. It was Swenson's reliance on C.F. & I.'s overstated bulletin in designing and imposing the



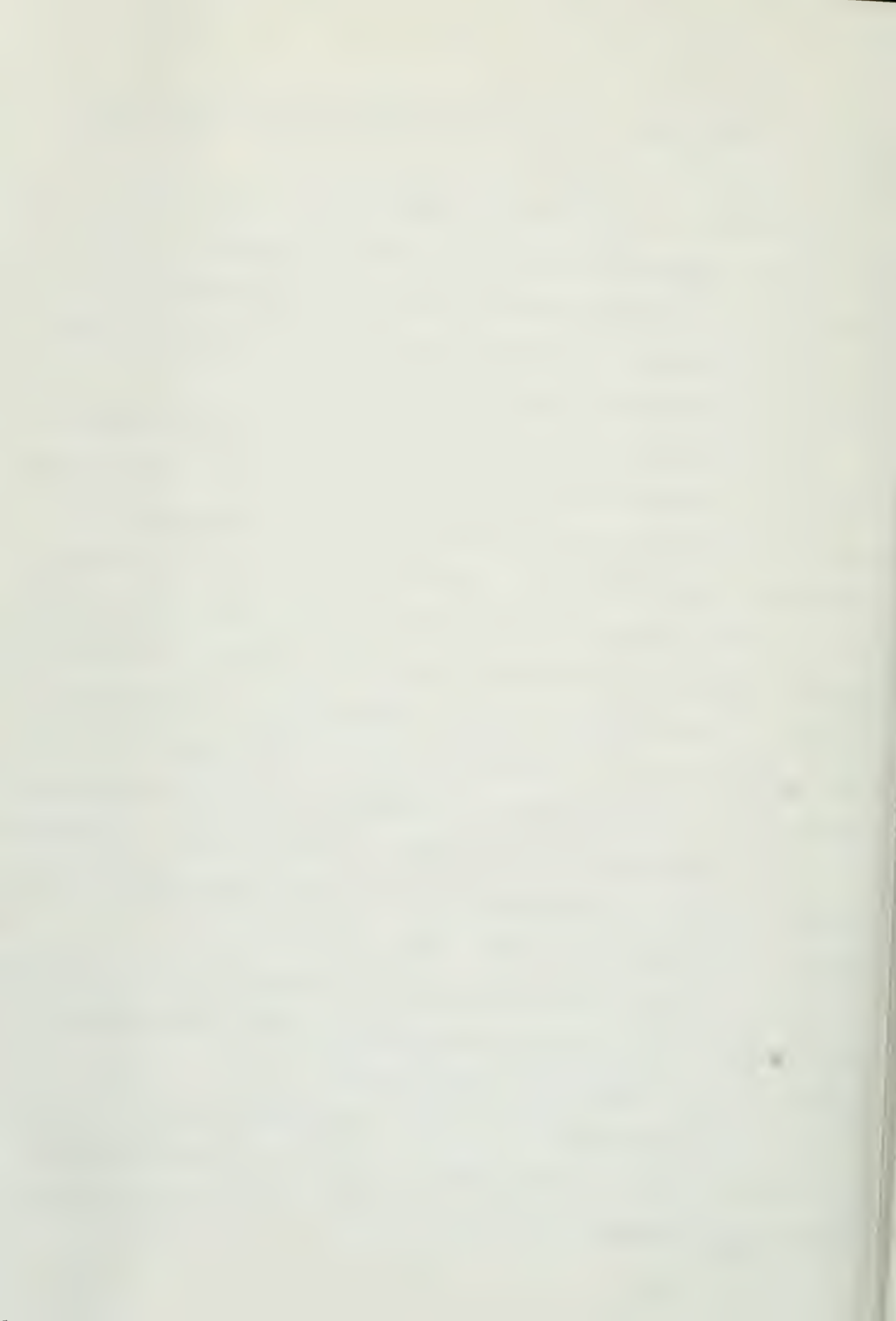
load on the hold-down strands which brought about DeRay Jacobson's death.

In defense of its bulletin PC 955, C.F. & I. urges there are a variety of hold-down systems in use and it could not therefore be expected to deliver warnings of the limitations of 270 K strand. But C.F. & I.'s expert Mr. Janney testified that the system used at United Prestress was very common. (Tr. 428).

C.F. & I. claims it did all that it could toward warning by printing the abstract specifications of the strand. But, as we have noted, the trial court disagreed, finding the literature inadequate. (R.A. 231-232). It is worse than that. It grossly overstates the merits of the product, all the while purporting to provide "complete information" about 270 K strand - - "an important engineering breakthrough recently announced. . . .with many distinct advantages." The falsity of C.F. & I.'s claims in this respect can be demonstrated by contrasting Exhibit 1 with Exhibit 2, a later publication, issued after the date of DeRay Jacobson's death. Exhibit 2 contains some warnings and replaced the earlier bulletin PC 955 (Ex. 1.) (Tr. 453.)

C.F. & I. also seeks to excuse its failure to warn by urging incompetence of its agents and representatives, an unthinkable defense and an admission of negligence.

To avoid liability for breach of warranty C.F. & I. assigns a peculiar meaning to the phrase "minimum ultimate strength" (utilizing the misleading quotation from PC 955 (Ex. 1) in the



process) but ignores entirely the even stronger and unambiguous phrase minimum Breaking Strength of Strand, 31,000 pounds, a statement for which it must be held accountable. Lane vs C.A. Swanson & Sons, 278 P. 2d 723, 725 (Cal. App. 1955). Further, as we have noted, even under C.F. & I.'s construction of PC 955, it states a warranty of approximately 28,000 or 29,000 pounds, i.e., minimum ultimate strength less allowance for mechanical damage. Even that compromised warranty was breached by failure of the strand under a load 5,000 pounds lower. See Hanson vs Firestone Tire & Rubber Co., 276 F. 2d 254 (6 Cir. 1960).

In connection with warranty C.F. & I. has tendered the time honored defense of want of privity of contract, citing the 1958 decision of Larson vs U. S. Rubber, 163 F. Supp. 327 (D. Mont.) But that defense is dead in Montana. The question of "privity" was extensively briefed before the trial court on C.F. & I.'s motion to dismiss. In lieu of repeating those arguments we invite the court's attention to the briefs of the Jacobson family on the subject, which are set out in the record. (See R.A. 16-43; 153-156).

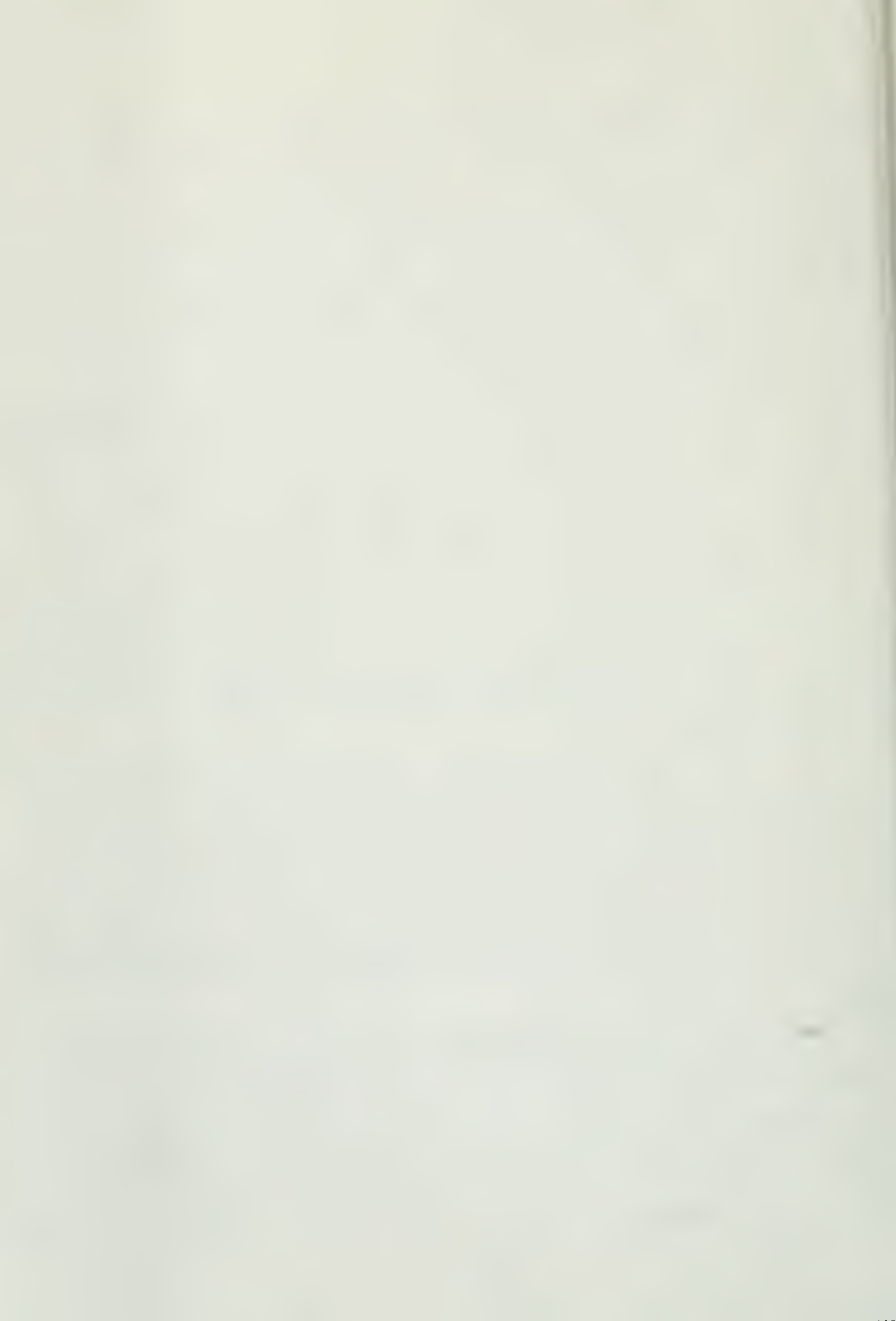
In Larson, absence of privity was declared to be legally insufficient as a defense to liability for negligence. As a defense in warranty cases it has been discredited by virtually every court to consider it since 1958. (See R.A. 16-43, supra). The Supreme Court of Montana has not approved the defense.

While this case was pending, the Supreme Court of Montana decided a case almost identical on its facts to Larson vs U.S.

Rubber, supra, and followed it without considering the current trend of the law. Counsel for the Jacobson family, and other attorneys, appeared before the Montana Supreme Court, on rehearing, amicus curiae. The facts of this case as they bear upon the privity defense, and the briefs and authorities appearing on this record, were submitted to the Supreme Court. As a result the court withdrew its former opinion and support of Larson vs. U.S. Rubber, supra, and deleted any suggestion that privity of contract is essential to an action based on warranties in Montana. The case was decided on other grounds. The only mention of privity is a statement in a concurring opinion by Justice John C. Harrison that privity should not be a shield in a breach of warranty action. Janqula vs United States Rubber Company. 147 Mont., 98, 410 P. 2d 462, 471, (1966).

For a statement of the merits of the privity issue and the overwhelming trend of modern authority against C.F. & I., the Jacobson family will rely upon the briefs in the record. (R.A. 16-43; 153-156). This court is fully conversant with the merits and trend of authority. Chapman vs Brown, 304 F. 2d 149 (9 Cir. 1963).

Montana is an enlightened state with new and modern rules of civil and criminal procedure, kept current and up to date by our Supreme Court. It has enacted the Uniform Commercial Code, a modern corporation code and other forward looking legislation. If the Montana Supreme Court will not sanction C.F. & I.'s outmoded



defense, the Jacobson family submits that this Court should not engraft the artificial "privity" requirement to the law of Montana. See Mason vs American Emery Wheel Works, 241 F. 2d 906, 910 (1 Cir. 1957).

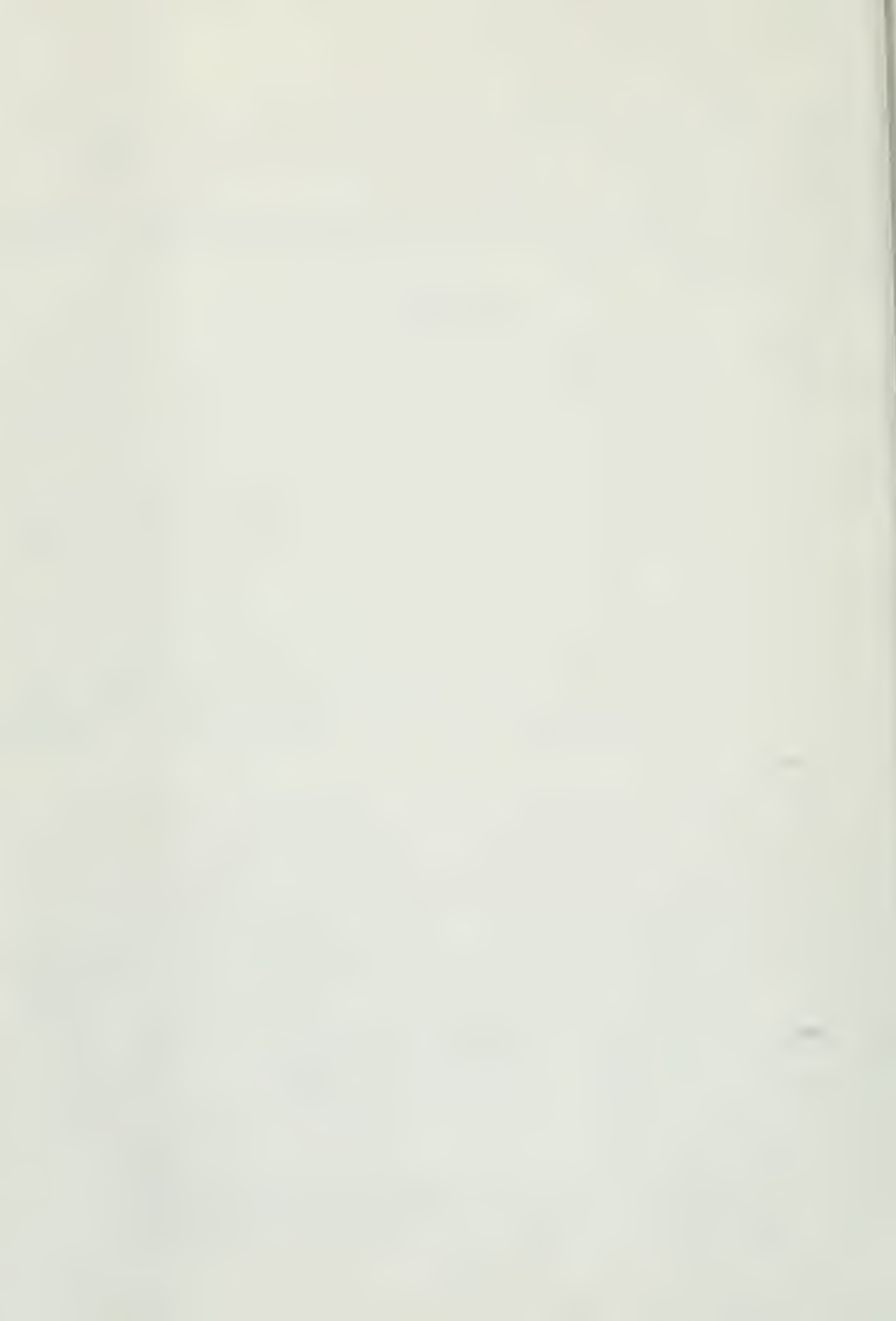
CONCLUSION

Without denying the failure of its strand under a load far below its represented strength, C.F. & I. has distorted the record to speculate on various causes of failure. The record will not support these speculations, in fact it directly contradicts them.

Tacitly admitting the trial court relied on knowledge ascribed to the wrong man, C.F. & I. has built a case of assumptions to ascribe knowledge to Floyd Swenson, the design engineer involved in DeRay Jacobson's death. These assumptions are contradicted by the trial court's findings and the actual testimony of Mr. Swenson on the subject.

The compromised standard C.F. & I. now urges for its 270 K strand, through emasculation of the language of its bulletin, was also breached by the failure of the strand under a load several thousand pounds below that standard. Regardless of the standard imposed -- 31,000 pounds or that by which C.F. & I. would measure the strand -- the Jacobson family is entitled to recovery. As said the court in Mannsz vs MacWhyte Co., 155 F. 2d 445, 446 (3 Cir. 1946):

If King was killed and Ellis was injured because the wire rope broke, having been subjected to less strain than that set forth in the table of



tensile strengths, the plaintiffs would be entitled to recover by way of breach of express warranty provided the wire rope was used by King for a purpose intended by MacWhyte.

Judgment should be reversed with instructions to the district court to determine damages and enter judgment for plaintiffs.

Respectfully submitted this 26th day of February, 1968.

CRESAP S. McCRACKEN
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BY: _____
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DOUGLAS C. ALLEN - Attorney.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 1968, I served three (3) copies of the within and foregoing Brief of Appellants upon Joseph R. Marra, Esq., Attorney for Colorado Fuel and Iron Corporation, a corporation, Appellee, by delivering them to him personally at his office in Great Falls, Montana.

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *PETITIONER*,

v.

HOTEL CONQUISTADOR, INC.
d/b/a HOTEL TROPICANA, *RESPONDENT*.

*On Petition for Enforcement of an Order of
the National Labor Relations Board*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

JAN 13 1968

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JAN 22 1968

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 22,330

NATIONAL LABOR RELATIONS BOARD, *PETITIONER*,

v.

HOTEL CONQUISTADOR, INC.
d/b/a HOTEL TROPICANA, *RESPONDENT*.

*On Petition for Enforcement of an Order of
the National Labor Relations Board*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136,

73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ to enforce its order issued against respondent, Hotel Conquistador, Inc., d/b/a Hotel Tropicana (hereinafter sometimes referred to as "Tropicana"), on June 24, 1966. The Board's decision and order (R. 39-56, 77-78)² are reported at 159 NLRB No. 105. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Las Vegas, Nevada, where respondent operates a gambling casino and hotel.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that Tropicana violated Section 8(a)(3) and (1) of the Act by discharging employee Frank Yockman because of his union activities, and violated Section 8(a)(1) of the Act by coercively interrogating Frank Yockman and by creating an impression that it was engaging in surveillance over its employees' union activities. The facts upon which the Board's findings are based are summarized below.

¹ The pertinent statutory provisions are reprinted in Appendix B, *infra*, pp. B1-B3.

² References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel and respondent, respectively.

A. The business of respondent

Respondent is, and has been at all material times herein, a Nevada corporation maintaining an office at Las Vegas, Nevada. During its past fiscal year, respondent purchased and received materials valued in excess of \$50,000 from outside Nevada; and during the same period, respondent sold goods and services at retail in excess of \$500,000 valuation (R. 40; Tr. 34-35, GCX (1)(C), para. II, GCX (1)(A), para. II).³ Respondent's Tropicana Hotel, the *situs* of the unfair labor practices, is typical of the show place hotel casinos of the Las Vegas "Strip." It has accommodations for 700 guests and employs from 600 to 700 people. The casino has the usual gambling devices and, in addition, maintains 180 slot machines on its playing floor for the use of patrons at all hours of the day and night (R. 44; Tr. 49-50). This proceeding concerns the slot machine mechanics and, in particular, Tropicana's former head slot machine mechanic, Frank Yockmen.

B. Respondent's unfair labor practices

Frank Yockmen had worked as a gaming employee for approximately 12 years in the Las Vegas area before being hired on March 18, 1962, by Harry Farnow, supervisor of Tropicana's slot machine department (R. 44; Tr. 38, 49, 91). Yockmen became a charter member of the Union⁴ on April 7, 1964, and was subsequently elected to the position of

³ It is settled that the Board has discretionary authority to assert jurisdiction over the Nevada gaming industry. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 427 (C.A. 9), cert. denied, 386 U.S. 915.

⁴ American Federation of Casino and Gaming Employees.

recording secretary. When the Union began its organizational drive in May 1966, Yockmen became the chief organizer. Thus, he solicited authorization cards from the cashiers, the floormen, and the slot machine mechanics. After contacting all 30 employees in the slot machine department, he had obtained 18 signed authorization cards (R. 44; Tr. 58). Late in May 1964, Yockmen solicited supervisor Phillip Daly, who declined to sign a card but said that he would go along with the Union if that was what the men wanted (R. 44; Tr. 62-63).

In May 1964, the Union filed a petition with the Board seeking to represent a unit of gaming employees at the Tropicana (R. 44; Tr. 64-65).⁵ Shortly after the petition was filed, the Company posted a copy of it in the slot machine repair shop (R. 46; Tr. 64-65). On June 1, 1964, Yockmen was working alone in the repair shop when Supervisor Harry Farnow walked in. Farnow pointed to the petition hanging on the wall and asked Yockmen if he “knew anything about this.” Yockmen answered “Yes” and added that he was a member and officer of the Union. Farnow made no reply and walked out of the shop (R. 45, 46; Tr. 63, 84). About an hour later, Yockmen learned from Supervisor Daly—a close associate of Farnow—that Farnow had been quite disturbed that Yockmen had not revealed to him his union interest and activities prior to the filing of the Union’s petition (R. 46-47; Tr. 85).

On August 6, 1964, Yockmen was making his rounds in the casino and stopped at the blackjack station to talk to George Harvey, a supervisor over Tropicana’s dealers, whom Yockmen had known for about three years. Previous to this conversation Yockmen had heard that a list of union officers

⁵ The petition was subsequently withdrawn (R. 44).

and others active in the Union was being distributed to all the casinos and that his name, marked by two stars, was on the list (R. 45; Tr. 121). Accordingly, during the conversation with Harvey on August 6, 1964, Yockmen said, "I hear there is a list in the pit." Harvey acknowledged that he did have such a list and volunteered that Yockmen's name was on the list and was marked by two stars. Yockmen asked Harvey what was the maximum number of stars after the name of any person on the list. When told that three stars was the maximum, Yockmen remarked that since he was on the executive board of the Union, his name should have been marked with three stars (R. 45; Tr. 87-89). ⁶ Harvey laughed and Yockmen continued on his rounds.

Late in August 1964, Yockmen and Union Business Manager Hanley met in the Union's office to discuss an accident which Yockmen had at the Tropicana (Tr. 125). As a result of this conversation, Hanley called the Nevada Industrial Commission and requested that the Commission investigate the accident (Tr. 129). The next day, August 31, Yockmen was called into the office of paymistress Lucretia Rozelle who asked, "What does Mr. Hanley have to do with this place?" (R. 51; Tr. 90). When Yockmen asked why she wanted to know, Rozelle stated that the Nevada Industrial Commission, at Hanley's request, was coming to investigate Yockmen's accident (R. 51; Tr. 91). On the next day, September 1, 1964, Frank Yockmen was terminated (R. 48; Tr. 48, 188). His termination slip stated that the reason was "reduction in force" (R. 48; Tr. 188).

⁶ Yockmen became a member of the Union executive board on July 13, 1964 (R. 44; Tr. 57).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board concluded that respondent had violated Section 8(a)(3) and (1) of the Act by discharging employee Frank Yockmen because of his union activities (R. 52, 77-78). The Board further concluded that respondent violated Section 8(a)(1) of the Act by interrogating Yockmen as to his union activities and by giving the impression that respondent was engaging in surveillance of union activities (R. 46, 47, 77-78).

The Board's order requires the respondent to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining or coercing employees in the exercise of their statutory rights. Affirmatively, the order requires respondent to offer reinstatement to employee Frank Yockmen; to pay him the wages which he lost because of the discrimination against him; and to post appropriate notices (R. 53-54, 77-78).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENT DISCHARGED EMPLOYEE FRANK YOCKMEN FOR HIS UNION ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT AND THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERFERING WITH, RESTRAINING AND COERCING ITS EMPLOYEES IN THE EXERCISE OF RIGHTS GUARANTEED BY SECTION 7 OF THE ACT.

The Board found that respondent discharged head slot machine mechanic Frank Yockmen because of his activities on

behalf of the Union. That Section 8(a)(3) and (1) of the Act prohibits "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership" is settled law. *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 39-40. Thus, the question for the Court is whether there is substantial evidence on the record as a whole to support the Board's finding that the discharge of Rank Yockmen was motivated not by legitimate business reasons, but by his union activities. See *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Shattuck Denn Mining Corp., v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9).

Yockmen's leadership in the Union's organizing campaign in May 1964 is established by the evidence summarized above, *supra*, pp. 3,5. Moreover, respondent was fully aware of Yockmen's participation in the organizational drive. Thus, shortly after the Union's petition for representation was posted in the repair shop, Supervisor Farnow, finding Yockmen alone in the repair shop, pointed to the petition and asked him if he "knew anything about this."⁷ Yockmen replied that he did and that he was a member and officer of the Union. Further evidence of respondent's knowledge of Yockmen's union activities is the list of prominent union members, including Yockmen, which

⁷ That such interrogation of an employee about his union activities during an organizational campaign is in violation of Section 8(a)(1) of the Act, and not protected by the "free speech" proviso of Section 8(c), is well settled law. *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, cert. denied, 368 U.S. 915; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 904 (C.A. 9).

respondent kept in its blackjack pit.⁸ As soon as the Union made its presence felt at the casino — by having the Nevada Industrial Commission investigate Yockmen's accident — the Company fired him.

At the hearing, the Company conceded that the reason given Yockmen for his discharge was a pretext, but argued that the real motive which it sought to mask was, not its opposition to his union activities, but its concern that he had become a "security risk." Thus, it appeared that ten months before his discharge, Yockmen had lost about \$1,000 in a gambling spree at other casinos. Because of the losses, he was unable to pay all his outstanding non-gambling debts, and he went to Daly, his immediate supervisor, explained his problem, and asked whom he should see to secure advances against his salary. Daly referred Yockmen to Lucretia Rozelle, the Tropicana paymistress. (R. 49; Tr. 301).

⁸ It is well settled that by thus giving an employee the impression that his union activities are being closely watched, an employer engages in unlawful surveillance within the meaning of Section 8(a)(1) of the Act. *N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F. 2d 100, 104-105 (C.A. 5); *Filler Products, Inc. v. N.L.R.B.*, 376 F. 2d 369, 374-375 (C.A. 4); *N.L.R.B. v. S & H Grossinger's, Inc.*, 372 F. 2d 26, 28 (C.A. 2) *N.L.R.B. v. Prince Macaroni Mfg. Co.*, 329 F. 2d 803, 805-806 (C.A. 1); *International Union of Electrical, etc., Workers v. N.L.R.B.*, 352 F. 2d 361, 362 (C.A. D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards); *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 685 (C.A. 2), enforcing 149 NLRB 862, 869, 870 (statement that Company knew how many employees attended a union meeting).

Yockmen gave the same explanation to the paymistress, and Rozelle agreed to let him have the "advances."⁹ Yockmen received advances from time to time during the six or seven months before his discharge on September 1, 1964. The advances were paid by checks signed by Tropicana's chief auditor. The checks were distinctive in appearance from the normal payroll checks (R. 49; Tr. 305-306), and on at least two occasions, Daly noticed Yockmen with these checks and commented on them.

As noted above, the first evidence of management concern about these advances arose *after* Yockmen assumed an outstanding role for the Union. Moreover, in view of the complicity of the paymistress, the chief auditor, and Yockmen's immediate supervisor, none of whom were even reprimanded (Tr. 162), it could hardly be maintained that Yockmen was discharged for accepting advances. Rather, the Company contended that the advances evidenced financial difficulties which might prompt Yockmen to steal and hence after several months, suddenly rendered him a "security risk." The Board properly concluded that this assertion, like the reason given on his termination slip, was also a pretext.

In the first place, other employees at the Tropicana, including Daly, gambled and had non-gambling debts, but were not considered security risks because of this activity (R. 51;

⁹ A sign on the paymistress' door read "Positively no advances in wages." Actually, the "advances" Yockmen received against his salary were drawn on wages already earned and not against wages not yet earned. The Tropicana pays its employees every two weeks, but always withholds a week's salary which is paid the employee upon termination. Thus, each draw by Yockmen represented wages that were due him on the date of the draw but which had been withheld by Tropicana (R. 50; Tr. 300, 318-319).

Tr. 174, 180-185). Nor was Yockmen's position particularly sensitive. The money which he was allegedly tempted to steal was contained in slot machines under repair. Yockmen's settled practice, however, was to have a supervisor check the coin level both before and after he worked on the machine (R. 49; Tr. 307), and both Farnow and Daly admitted on the stand that they never had reason to entertain the slightest suspicion that Yockmen was taking any of this money (R. 49; Tr. 245, 250). Moreover, since the real concern allegedly was Yockmen's financial situation, the significant facts would be how he got into debt and whether his situation was improving or worsening. Farnow in fact inquired into the circumstances, but only *after* he had discharged Yockmen (R. 50; Tr. 159-160, 189).

In sum, respondent's unlawful interrogation of Yockmen during the Union's organizational drive, its unlawful surveillance over Yockmen's union activities, its displeasure concerning Union Manager Hanley's processing the workmen's compensation claim, and the obviously pretextual reason given for Yockmen's discharge, all furnish ample support for the Board's finding that Yockmen was discharged for his union activity. See *Aeronca Mfg. Co. v. N.L.R.B.*, F. 2d , 66 LRRM 2574, 2576 (C.A. 9); *N.L.R.B. v. Harrah's Club*, 362 F. 2d 425, 428-430 (C.A. 9), cert. denied, 386 U.S. 915; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F. 2d 92, 93 (C.A. 9); *N.L.R.B. v. Idaho Potato Processors, Inc.*, 322 F. 2d 573, 575 (C.A. 9); *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 907 (C.A. 9).

II.

THE BOARD PROPERLY REJECTED RESPONDENT'S ARGUMENTS THAT THE SECTION 8(a)(1) ALLEGATIONS WERE TIME-BARRED AND SHOULD HAVE BEEN DISMISSED.

The original charge was filed on September 29, 1964, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. More specifically, the charge alleged:

On September 1, 1964, the above-named employer [Tropicana Hotel] discharged Frank Yockmen, who had been employed by it as a slot machine mechanic, because of his membership in, activities on behalf of, and sympathy for the below-named labor organization [American Federation of Casino and Gaming Employees] (GCX 1(a)).

On April 2, 1965, a complaint was issued, alleging not only the unlawful termination of Yockmen but also that respondent gave an employee the impression that respondent was engaging in surveillance of employees' union activities (GCX 1(a), II, V) in violation of Section 8(a)(1) of the Act. On August 5, 1965, the General Counsel moved to amend the complaint and add an additional violation of Section 8(a)(1) of the Act by respondent, alleging that respondent unlawfully interrogated Frank Yockmen (R. 42; Tr. 146, 151).

Before the Board, respondent moved to dismiss the independent Section 8(a)(1) violations because they had not been alleged in the charge. In *N.L.R.B. v. Osbrink*, 218 F. 2d 341, 345 (C.A. 9), cert. denied, 349 U.S. 928, this Court was faced with the arguments set forth by respondent in the instant case. Here, as in *Osbrink*, the complaint was issued on

a timely charge and the only question was whether an amendment or new allegation of unlawful conduct in the complaint was proper. Rejecting respondent's arguments in *Osbrink*, this Court recognized that where specific actions are alleged for the first time in the complaint, Section 10(b) "has been uniformly interpreted to authorize inclusion within the complaint of amended charges — filed after the six months' limitation period — which 'relate back' or 'define more precisely' the charges enumerated within the original and timely charge." *Id.* at 345. See also, *N.L.R.B. v. Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2); *N.L.R.B. v. Local 169, Industrial Division, Teamsters Union*, 228 F. 2d 425, 427-428 (C.A. 3).

The only relevant question, then, is whether the allegations of violations of Section 8(a)(1) of the Act in the complaint were sufficiently interwoven with the allegations in the charge as to permit such a "relation back." Clearly, these allegations — which merely added additional specific instances of unlawful conduct involving the same time period, the same employee, the same supervisors, the same objective — were allegations of unfair labor practices which were a continuation of and "in pursuance of the same objects" as the unfair labor practices already alleged. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 369; *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, 306-307. See *Texas Industries, Inc. v. N.L.R.B.*, 336 F. 2d 128, 131-132 (C.A. 5), where the court permitted amendment of the complaint at the hearing to include specific Section 8(a)(1) violations which were not alleged in the charge or original complaint. Accord: *N.L.R.B. v. Kohler Co.*, 220 F. 2d 3, 6 (C.A. 7).

Respondent was in no way prejudiced by the procedure in the instant case. At no time did it contend that it was surprised or unable to defend itself against the charge, or even that it needed a continuance to prepare a defense. Indeed, the Company had the opportunity to examine both Farnow and

Yockmen, but never asked either of them about the incident. As to the unlawful surveillance, the respondent attempted to refute the charge by the testimony of George Harvey (Tr. 275-276). Further, respondent presented relevant legal argument in its exceptions and briefs to the Trial Examiner and Board. Clearly, therefore, the matters were fully litigated and the Company was not prejudiced by the absence of the Section 8(a)(1) charges in the original charge. Thus, as the Eighth Circuit recently stated in a related context, the existence of this violation was “a material issue which has been fairly tried by the parties [and] should be decided by the Board. . . .” *American Boiler Manufacturers Ass’n v. N.L.R.B.*, 366 F. 2d 815, 821.¹⁰

¹⁰ Before the Board, respondent also argued that Trial Examiner committed prejudicial error by permitting the counsel for the General Counsel to reopen his case after he had rested but before respondent had begun his defense in chief. Nowhere does respondent explain how this action by the Trial Examiner was prejudicial to respondent’s interests. In the absence of such a showing, it is well settled that it is within the sound discretion of the judge conducting the trial whether or not to admit further evidence after the party offering the evidence has rested. *Simsirdag v. United States*, 315 F. 2d 230, 231 (C.A. 5) (criminal action). See also, 88 C.J.S. *Trial*, Sec. 105, at 220 (1955).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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January 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

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APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise : * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practices, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business,

for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

No. 22330

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
vs.	
HOTEL CONQUISTADOR, INC. d/b/a HOTEL TROPICANA,	
	<i>Petitioner,</i>
	<i>Respondent.</i>

Brief for Respondent

FILED

MAR 4 1968

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MAR 11 1968

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United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOTEL CONQUISTADOR, INC.
d/b/a HOTEL TROPICANA,
Respondent.

Brief for Respondent

ARGUMENT

- I. **The Board's Finding That the Company's Discharge of Employee Frank Yockmen Was Discriminatory and Motivated by His Union Activities, Rather Than by Legitimate Business Reasons, Is Not Supported by Substantial Evidence on the Record Considered as a Whole.**
- A. **THE INSUBSTANTIAL EVIDENCE ON WHICH THE BOARD RELIED IN FINDING AN IMPROPER "MOVING CAUSE" FOR THE DISCHARGE OF YOCKMEN.**

The issue before the court in determining whether the Company violated § 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and (1), is whether substantial evidence on the record as a whole supports the Board's finding that the "moving cause" of employee Frank Yockmen's discharge [*NLRB v. Security Plating Co.*, 356

F.2d 725 (9th Cir. 1966); *NLRB v. Texas Independent Oil Co.*, 232 F.2d 447, 450 (9th Cir. 1956)] was "discrimination to discourage participation in union activities" [*Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-40 (1954)]. See: *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Shattuck Denn Mining Corp. v. NLRB*, 367 F.2d 466, 467 (9th Cir. 1966). And, as recently reaffirmed by this court in *Aeronca Mfg. Co. v. NLRB*, 385 F.2d 724, 727 (9th Cir. 1967):

"*A fortiori*, if the discharge is *actually* motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause."

The Board, in its brief to this Court and in its Decision and Order adopting the decision of the Trial Examiner, seeks to show that the Company discharged employee Frank Yockmen because of his union activities. In support of this finding the Board relates facts which, particularly when considered on the record as a whole, do not constitute substantial evidence of the unfair labor practice alleged. While the entire transcript of proceedings before the Trial Examiner constitutes the most eloquent argument in support of the Company's position here, it is necessary to comment upon much of the evidence presented at the hearing in order to expose the fallacies and lack of supporting evidence found in the Board's decision and argument.

In the Trial Examiner's decision relating to the alleged discriminatory discharge (R. 48-52),¹ and the Board's brief,

1. References to the pleadings and the Decision and Order of the Board are designated "R." References to the transcribed portions of the hearing are designated "Tr."

page 7, it is first emphasized that Yockmen was a leader in the Union's organizing campaign in May of 1964, that he was later elected an officer of the Union, and that these facts became known to his employer. The Company did not deny this at the hearing, and does not do so now. It is noteworthy in connection with the alleged "discrimination" which the Board concluded had the effect of "discouraging membership" in the Union (R. 53), that Yockmen himself voluntarily disclosed these facts when he solicited the signature of Philip Daly to a Union authorization card (Tr. 62), and offered the fact that he was an officer in the Union to his immediate supervisor, Harry Farnow (Tr. 84), and to at least two other management personnel (Tr. 86, 89). These completely unsolicited remarks of Yockmen can hardly be said to evidence fear of reprisal on his part, or anti-union animus on the part of the Company.

The Board next seeks to attach a great deal of significance to the fact that, according to the Board, on one occasion paymistress Lucretia Rozelle asked Yockmen "rather sharply" what a Mr. Hanley, business manager for the Union, "had to do with this place." (R. 51; Tr. 90). "The question was asked in apparent criticism of the fact that Hanley had requested the Nevada Industrial Commission to investigate an industrial accident Yockmen had suffered at the Tropicana." (R. 51).

In the first place, the Board's statement that the question was put "rather sharply" is simply without foundation in the record. The entire evidence on this point was the following testimony of Yockmen:

"Q. [by Mr. Hecht, counsel for the General Counsel]
Can you tell us what was said?

A. Well, she said what does Mr. Hanley have to do with this place.

Q. What, if anything, did you say?

A. I said, Why?

Q. What did she say?

A. She said that the Nevada Industrial Commission was coming down to take a report, and investigate my accident report there, the request of Mr. Hanley.

Q. And what, if anything, did you say to that?

A. I said—Well, she said that they had been down here at 10:00 o'clock in the morning and that it was around 9:00 in the morning.

Q. Was there any further conversation?

A. No." (Tr. 90-91).

In its brief, page 5, the Board states that this conversation occurred the day before Yockmen was dismissed, thereby suggesting that the discovery of the Union representative's interest and presence on the scene led immediately to Yockmen's dismissal. This also is simply not true. Yockmen was fired September 1, 1964. The only evidence as to the date of the conversation was provided by Yockmen himself, who said that it occurred on August 13, 1964 (Tr. 90), more than two weeks before the discharge. And the Trial Examiner's decision obviously adopts the August 13 date (R. 51).

Moreover, there is no suggestion that the paymistress knew or had any reason to know that Hanley was a representative of the Union. Considered in this light, and in view of Yockmen's somewhat unintelligible restatement of the paymistress' comments quoted above, her question in context reflects nothing more than idle curiosity. At the most, the conversation reflects the paymistress' concern that an outsider was taking up her time, and infringing upon what she may have felt to be her and the company's exclusive domain.

The Board next relies on what it terms “unlawful interrogation” of Yockmen by supervisor Farnow, not only to buttress its discriminatory discharge finding, but also as the sole basis for finding a separate § 8(a)(1) violation. Again, for the purpose of demonstrating the paucity of evidence offered in support of these charges, the following entire testimony, extracted from a transcript of more than 300 pages, is as follows:

“Q. [by Mr. Hecht] Will you tell us what was said in the conversation?

A. [by Mr. Yockmen] Well, he [Farnow] pointed to me the petition [for Union recognition] on the wall and he asked me if I knew anything about this.

Q. And what did you say, if anything?

A. I said, ‘Yes’ that I was a member and officer of the Union.

Q. Did he make any reply to this?

A. No, none whatsoever. He walked out of the casino.” (Tr. 84).

The Board, seeking to embellish this meager testimony, notes that at the time of the conversation with Farnow, on about June 1, 1964, the Union was conducting an organizational drive. But the Board fails to note that well before Yockmen’s discharge occurred, the Union had requested, and the Regional Director had approved, the withdrawal of its petition (Tr. I, pp. 563-565 in No. 2-RC-5956).

The Board’s brief relates that about an hour after Yockmen’s conversation with Farnow, Yockmen learned from Daly (whom the Board found to be a supervisor) that Farnow had been “quite disturbed that Yockmen had not revealed to him his union interest and activities prior to the filing of the Union’s petition” (Bd. Br. 4). The Board again puts words in its own witness’s mouth. The actual testimony of Yockmen was:

“A. Well, Mr. Farnow had gone home and Phil Daly walked into the slot machine shop, oh, maybe an hour later, and I asked him if Mr. Farnow had said anything to him or if he was hot and Phil replied, ‘No, he wasn’t hot about anything.’

He was *just a little disturbed* that I didn’t mention to him about *this activity* before the petition for election was held.” (Emphasis supplied) (Tr. 85).

“[T]his activity” at least arguably referred to the filing of the petition, and not to Yockmen’s union activities, and “just a little disturbed” is clearly not “quite disturbed”. Moreover, since it was not established at precisely what time in May the copy of the Union’s petition was filed in the shop (R. 45), the Trial Examiner was clearly unjustified, after noting that the Farnow-Yockmen conversation took place about June 1, in stating:

“It is inferred from this that Farnow had knowledge of the filing of the Union’s petition for some time prior to his inquiry of Yockmen as to what he knew about the Union’s petition.” (R. 46-47).

Again, the circumstance is noted by the Board with sinister implications that Farnow approached Yockmen after he found him “alone” in the workshop (Bd. Br. 4; R. 46). But the fact is, as related by Yockmen and other witnesses, that he always or usually worked alone in the shop (Tr. 101, 175-176, 224).

B. THE EVIDENCE ESTABLISHING A PROPER AND REASONABLE "MOVING CAUSE" FOR THE DISCHARGE OF YOCKMEN.

Respondent contends, in light of the above, that the Board has failed to show substantial evidence that Yockmen was discriminatorily fired for Union activities. When considered with the evidence that the Company’s “moving cause” for

firing Yockmen was for security and legitimate business purposes, the Board's evidence is less than insubstantial.

The uncontradicted testimony at the hearing established the following facts. Employee Yockmen was the Tropicana's head slot machine mechanic (Tr. 48). His duties included the repair and maintenance of the approximately 180 slot machines in use at the Tropicana (Tr. 49). When a machine broke down, he would often take it to the workshop where he worked alone and unobserved, and had access to approximately \$10,000-\$11,000 worth of tools and to an uncounted number of coins in the machinery (Tr. 175-176, 99-102, 222-226). He also filled the machines with uncounted coins constituting the "jackpots" (Tr. 224-225).

As might be expected under such circumstances, Farnow testified that Yockmen was in a "position of trust" (Tr. 163), and Daly stated that the single most important employee qualification for getting and retaining a job at the casino "would be honesty, probably . . . [b]ecause you handle a lot of uncounted money." (Tr. 232-233). Indeed, Yockmen himself admitted that he and others were left "on their honor" in handling the uncounted coins (Tr. 102, 307)

"Q. . . . And you would say, then, that it was important for Mr. Farnow to have confidence in everyone of you?

A. And it was of paramount importance, right." (Tr. 103).

On August 31, 1964, while supervisor Farnow was confined in the Las Vegas Hospital, he was first informed by Daly—on one of Daly's regular visits to the hospital to keep Farnow abreast of Company progress (Tr. 207)—that employee Yockmen had been taking advances on his salary because of substantial gambling losses (Tr. 153-154). Specif-

ically, Farnow was told that Yockmen had been taking an advance on his pay between every pay period for a period of "many months" because he owed "a lot of money" on a gambling debt (Tr. 159, 181-182, 190). According to Daly, Farnow became so upset on hearing this, that "I thought he was going to have a heart attack." (Tr. 236-237), and Farnow immediately directed Daly to return to the hotel and prepare a termination slip for Yockmen, which was done (Tr. 156-160, 210-213, 237). Farnow testified, although he could not specifically recall that it was done in Yockmen's case, that it was his general policy to discuss the subject of advances with all newly-hired employees; and a sign stating "Positively no advance in wages" was posted in a conspicuous place on the door of the paymistress' office (Tr. 163, 200, 229).

Particularly in view of the requirement of strict security standards and the sensitive position occupied by the gambling casinos (Tr. 104), it is not surprising that Farnow therefore considered Yockmen to be a security risk and an undesirable employee (Tr. 164-165). Yockmen himself testified that he obtained two advance checks per month for a period of six or seven months because he incurred a gambling debt of approximately \$1,000, and gave an evasive answer when asked whether or not he had been told by the paymistress that he shouldn't be taking advances (Tr. 304-305).

Most of the Board's efforts and argument at the hearing and in its decision and brief are focused in an attempt to discredit the reasons given by the Company for the firing of Yockmen. None bear careful scrutiny.

It is first noted that the reason given for Yockmen's discharge on the termination slip, "reduction in force," was a pretext admitted to by the Company. This is true, since it

was customary to employ this euphemism in such cases, and to give the real reason only when asked (Tr. 157-158, 217, 251-252). Why an employer should not be able to protect itself from the possibility of libel and slander suits, and give an employee every benefit of doubt on his permanent record is not explained or contradicted by the Board.

The Board next points out that the paymistress, the chief auditor and Daly knew of the advances long before Yockmen was terminated, and none of them were ever reprimanded to the knowledge of the witnesses. However, Farnow was the person who fired Yockmen (Tr. 157), and he was not told of the advances until August 31, 1964.

The Board emphasizes that although the advances had been made for a period of time, the Company contended that the acceptances of advances "suddenly rendered him a 'security risk.'" (Bd. Br. 9). This attack fails to appreciate the circumstances presented in the whole record. In the first place, Yockmen stated that the paymistress said "she was doing it for me," implying a favor (Tr. 305). She admitted to Farnow after the discharge that she should have informed him of the advances earlier (Tr. 188). As for Daly, sometime during the first quarter of 1964 he noticed the distinctive advance paycheck in Yockmen's possession and was then told by Yockmen that he had heavy gambling debts and needed the advance money (Tr. 197-198). During the latter part of August, 1964, Daly again noticed an advance check in Yockmen's possession and "asked her [the paymistress] about it," within a few days thereafter (Tr. 201-206). Paymistress Rozelle confirmed the advances and the reason therefor, and within the next two days Daly mentioned the matter to Farnow at the hospital (Tr. 206-208). He had not mentioned the matter to Farnow earlier because he "didn't think it possible" to

obtain advances without Farnow's prior approval (Tr. 207).

What would the Board say if Yockmen had been fired for accepting only one advance? Surely the inference of improper motive would be far stronger in that case than in the present one, where the employee has demonstrated a six-month history of inability to put his financial affairs in order. The Board's reliance upon the fact that other employees gambled and had non-gambling debts (of minor amounts, to be sure) is misplaced for the same reason—none of them were forced to seek continuous advances for a period of many months in order to satisfy those debts. The fact that the advances covered monies already earned, but not yet due, detracts not one whit from the security risk presented by an employee history of six months of financial difficulties caused by uncontrolled gambling. The Trial Examiner's attempted distinction between advances to pay gambling debts, and advances to pay bills unsatisfied because of gambling losses, is without logical merit. And the distinction is of clearly insufficient worth to justify the adverse inference drawn by the Trial Examiner from the Company's failure to call the paymistress as a witness to explain the alleged discrepancy as to what she was told by Yockmen (R. 50-51).

Finally, the Board seeks to belittle the fact that Yockmen had access to uncounted casino money (Bd. Br. 10; R. 10-11). It notes that the money level in the slot machines was checked before and after Yockmen's work, but fails to appreciate that Yockmen testified that no set procedure was required to be followed, and that his voluntary checking system was often not effective since the supervisors usually left him on his honor (Tr. 102, 307). The Board also neglects to mention the \$10,000 in tools where Yockmen worked alone

and unobserved, or the jackpot currency handled by Yockmen. Finally, for all its vaunted "expertise", the Board fails to appreciate the simple fact that no employer, however careful his checking procedures may be, would wish to retain an employee who has repeatedly demonstrated his inability to handle debts arising from wagering, particularly when that employee works around a great deal of cash in his employer's establishment.

In this case, the Board believed the testimony of Yockmen and discredited that of the witnesses Farnow, Daly, and Harvey, wherever a conflict appeared, even though the Trial Examiner gained a "strong impression" of "their liking for him [Yockmen] as a person" and "detected . . . a latent distaste for the testimony they were giving against Yockmen." (R. 49). There was no independent evidence of anti-union bias or any other evidence of improper motive in the firing of Yockmen. None of the witnesses knew of advances given to any other employees in violation of the Tropicana's established no-advance policy (Tr. 160, 276-277, 279-280). Almost all of the testimony of the Company's witnesses was elicited by General Counsel under cross-examination, conducted prior to the employer's direct examination pursuant to Fed.R.Civ.Proc. 43(b). And witness Daly, at the request of counsel for the General Counsel, was absent from the hearing room during the testimony of Supervisor Farnow (Tr. 155).

The Board would have us believe that the Company, through the concerted activity of Farnow, Daly, the paymistress, the auditor, and unknown higher-ups, formulated a plan to entice Yockmen into accepting advances to cover his gambling debts; that they then fired him for doing so simply because he was active in the affairs of a Union which by that time had withdrawn its petition for recogni-

tion; and that they subsequently agreed upon a consistent lie to tell at the hearing. In support of this contention, the Board offers only the following concrete evidence: Yockmen was active in the Union; the Company knew it; Yockmen was fired. In the face of the Company's amply documented "moving cause" for his discharge as a security risk, the Board's contention is simply not supported by substantial evidence on the record as a whole, however insurmountable that test may, in the ordinary case, prove to be.

"It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the Act." *NLRB v. Standard Coil Products Co.*, 224 F.2d 465, 470 (1st Cir.), cert. denied, 350 U.S. 902 (1955).

Nor may the Board substitute its judgment for that of the employer as to what constitutes reasonable grounds for discharge. *NLRB v. Wagner Iron Works*, 220 F.2d 126, 133 (7th Cir. 1955), cert. denied, 350 U.S. 981 (1956); *NLRB v. Ogle Protection Service, Inc.*, 375 F.2d 497, 505 (6th Cir. 1967).

Moreover, the Board's case rests solely on Yockmen's testimony which it has credited. The general rule, of course, is that where the credibility of a witness is in issue, the matter is for the determination of the Trial Examiner and the Board. However, it has been held that when, under circumstances similar to those present in this case, the findings of the Trial Examiner and the Board are based primarily on the uncorroborated testimony of the party who stands to benefit from an award of reinstatement and back pay, such testimony may not constitute substantial evidence. *NLRB v. Ogle Protection Service, Inc.*, 375 F.2d 497, 505-506 (6th Cir. 1967); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964).

Finally, it bears noting that “[t]he fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities.” *NLRB v. Citizen News Co.*, 134 F.2d 970, 974 (9th Cir. 1943). Accord: *Osceola County Co-op. Cream Assn. v. NLRB*, 251 F.2d 62 (8th Cir. 1958); *NLRB v. Montgomery Ward & Co., Inc.*, 157 F.2d 486 (8th Cir. 1946). See the Board’s decisions in: *Gold Merit Packing Co., Inc.*, 142 NLRB 205 (1963); *Mackie-Lovejoy Mfg. Co.*, 103 NLRB 172 (1953); *John S. Barnes Corp.*, 92 NLRB 589 (1950); *Stainless Ware Co. of America*, 87 NLRB 138 (1949); *Dixie Mercerizing Co.*, 86 NLRB 285 (1949). And, as the court said in *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956):

“With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence toward the unlawful one.”

II. The Allegations of the Complaint Charging the Company with Violations of § 8(a)(1) of the Act by Virtue of the Company's Alleged "Unlawful Interrogation" and "Impression of Surveillance" Were Barred by the Limitation Period Provided in § 10(b) of the Act.

Section 10(b) of the National Labor Relations Act provides:

“That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board. . . .” 29 U.S.C. § 160(b).

The Board attempts to justify the late inclusion of the new and separate § 8(a)(1) violations in the complaint by urging that they “related back” to the charge originally filed on September 29, 1964. *NLRB v. Osbrink*, 218 F.2d 341 (9th Cir. 1954), cert. denied, 349 U.S. 928 (1955). In *Osbrink*, the formal charges filed with the Board encompassed “the discharge of and discrimination against employees in violation of § 8(a)(1) and (3) of the Act.” 218 F.2d at 345. The court there allowed allegations of threats, promise of benefits and unlawful interrogation to remain in the complaint, because these allegations related to the same acts contained in the original charge. 218 F.2d at 347. And, citing *Cusano v. NLRB*, 190 F.2d 898 (3rd Cir. 1951), this court noted that the Third Circuit allowed a charge to relate back “because the employer would not be prejudiced since he would ‘retain pertinent records, interrogate witnesses and, in a general way, prepare his defense’ to the unfair labor practices complained of in the charge. [page 903.]” 218 F.2d at 346.

However, in the instant case, the original charge filed with the Board alleged only a violation of § 8(a)(1) and (3) of the Act in that the Company unlawfully discharged Frank Yockmen (R. 3). No allegation was made, as in *Osbrink*, of other discrimination against Yockmen or his fellow employees.

On April 2, 1965, the complaint was issued which alleged, in addition to the unlawful discharge of Yockmen, that the Company “gave an employee the impression that the Respondent was engaging in surveillance of employees’ Union activities,” naming George Harvey as the offending agent. (R. 5).

It was not until the second day of the hearing, on August 5, 1965, that the General Counsel moved to amend the

complaint to allege a separate and additional violation of § 8(a)(1) in the alleged unlawful interrogation of Yockmen by supervisor Farnow occurring on or about June 1, 1964.

The allegations of the two additional § 8(a)(1) violations are clearly not within the original unlawful termination charge, and gave the employer no reason to "retain pertinent records, interrogate witnesses and, in a general way, prepare his defense". This is not a case in which, as in *Texas Industries, Inc. v. NLRB*, 336 F.2d 128 (5th Cir. 1964), the alleged violations were "collateral unfair labor practices stemming directly from the company's preparation of its defense to be disposed of in the same proceeding." 336 F.2d at 132. And the statement taken from *American Boiler Manufacturers Assn. v. NLRB*, 366 F.2d 815, 821 (8th Cir. 1966), to the effect that "a material issue which has been fairly tried by the parties should be decided by the Board," is inapplicable here. Surely the Board does not contend that the Company, having unsuccessfully objected to the inclusion of the additional § 8(a)(1) allegations, was thereafter precluded from offering evidence in opposition thereto without relinquishing its claim that these charges were time-barred by § 10(b).

Moreover, the facts surrounding the purported "unlawful discharge" and "impression of surveillance" were well-known to the charging party at the time the original charge was filed; as it developed at the hearing, Yockmen was the only employee involved. No excuse is offered by the Board for the delay in raising the surveillance issue, or for the delay in charging the Company with unlawful interrogation until *the second day of the hearing*.

Under the circumstances, the Board should have refused to consider the additional § 8(a)(1) violations at all.

III. Assuming That the Allegations of the Separate and Independent § 8(a)(1) Violations Were Not Time-Barred, the Board's Findings That the Company Engaged in "Unlawful Interrogation" and Gave Employee Yockmen the "Impression of Surveillance" of His Union Activities, Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

A. THE ALLEGED "UNLAWFUL INTERROGATION".

Assuming that the allegation of unlawful interrogation was not time-barred by § 10(b) of the Act, the alleged "interrogation" of Yockmen by Farnow is, as set forth in Argument I, *supra*, clearly insufficient to support the finding of an unfair labor practice. The simple question "[D]o you know anything about this?" addressed to Yockmen concerning the Union petition, is so patently inoffensive and non-coercive that it is difficult to determine how the Board could have concluded that it interfered with, restrained, or coerced Yockmen in the exercise of his protected rights.

No case has been offered by the Board in which even roughly similar statements constituted an unfair labor practice. In *NLRB v. West Coast Casket Co., Inc.*, 205 F.2d 902 (9th Cir. 1953), cited by the Board, the president of respondent company, during the Union's organizational campaign, interrogated employees as to their feelings about the Union and queried them as to why they thought the Union was needed. The employer also announced new economic benefits in the course of these interrogations, and committed numerous other violations of the Act by making threats, announcing benefits and voicing extreme opposition to the Union. And in the Board's remaining cited decision, *NLRB v. Harrah's Club*, 362 F.2d 425 (1966), cert. denied, 386 U.S. 915 (1967), the Board had previously found that the employer and its representatives threatened and questioned various employees during and immediately

after the Union's organizational campaign, and tacitly threatened loss of jobs, positions, and benefits resulting from the Union's success. 150 NLRB 1702 (1965).

In *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26, 28 (2nd Cir. 1967), the court noted that evidence of unlawful interrogation was subject to the "fairly severe standards" set forth in *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). As stated in *Bourne*, these standards include:

"(1) The background, i.e. is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e. how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?

(5) Truthfulness of the reply." 332 F.2d at 48.

Not one of these factors can be said to apply here in support of the Board's findings of unlawful interrogation. See, generally: *Filler Products, Inc. v. NLRB*, 376 F.2d 369, 374 (4th Cir. 1967); *NLRB v. Ambrose Distributing Co.*, 358 F.2d 319 (9th Cir. 1966); *NLRB v. Ritchie Mfg. Co.*, 354 F.2d 90, 98-99 (8th Cir. 1965); *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 806 (1st Cir. 1964).

Finally, and significantly, the Board itself has held that no § 8(a)(1) violation may be found where the employee in fact volunteers the fact of his membership and interest in the Union, as did Yoekmen in this case. *Southern Athletic Co.*, 157 NLRB 1051, 1060-1061 (1966).

B. THE ALLEGED "IMPRESSION OF SURVEILLANCE".

The Trial Examiner also found that the Company committed a separate violation of § 8(a)(1) of the Act by giving employee Yockmen the "impression that the Respondent was engaging in surveillance of employees' Union activities" (R. 46). In support of this finding, the Board again relies upon the testimony of Yockmen, who stated that during one of his rounds he stopped to talk to George Harvey, a floorman for the casino (Tr. 271), and said, "I hear there is a list in the pit." (Tr. 87). Harvey purportedly answered, "Yeah, . . . and your name's on there with two stars behind them," to which Yockmen replied:

"I said—well, I says that I feel pretty bad, and I asked him first, I says, who has the most stars behind their names and I didn't ask him who I meant—I asked what was the most stars behind the names and he said three, so I said that I feel pretty bad and I said I was elected to the executive board and I should have three stars myself, and he laughed and I walked away, went about my rounds." (Tr. 88-89).

In considering the effect of this testimony, it is necessary to note, in the first place, that Harvey admitted having talked to Yockmen, but flatly denied that such a conversation concerning the alleged "list" ever occurred. (Tr. 275-276).

Secondly, Yockmen was allowed to testify, over the Company's objection, that he was referring to a list of nominees and officers of the Union (Tr. 87-88). He also stated that the "stars", or asterisks, indicated "Position, prominence" in the Union (Tr. 87-89). However, there was no evidence that such a list actually existed or was related to the Union activities of the people allegedly named thereon. Hanley, business manager for the Union, testified that he told

Yockmen of the list, but his statement that "I had been informed that they [the Union officers and nominees] are on the black list and going to be discharged," was properly ordered stricken as hearsay (Tr. 121). No evidence was offered as to the source upon which Hanley based the information given to Yockmen; and there was no suggestion that Yockmen obtained his information in any other manner.

Thirdly, assuming that the conversation actually occurred, Harvey's jocular response to Yockmen's comments indicates that he may have simply "gone along with" what he apparently considered to be a joke.

But even assuming (1) that Harvey lied, (2) that such a list actually existed, (3) that the names of Union dignitaries were noted thereon, and (4) that the Company had the list in its possession, still the Board has failed to provide substantial evidence that Yockmen was interfered with, restrained or coerced in the exercise of his rights guaranteed by the Act. It was the Union business manager, not an employer representative, who gave Yockmen any "impression" of surveillance which he may have felt. It was Yockmen who broached the subject of the list to Harvey, not *vice versa*.

All of the cases cited by the Board on the issue of surveillance are properly concerned with instances where an employer sought to intimidate or coerce his employees by deliberately fostering impressions of his concern about, i.e. disapproval of, their Union activities. See cases cited in the Board brief, page 8, n.8. Such is clearly not the situation presented here.

Finally, as with alleged unlawful interrogations, the Board itself has taken the position that where it was commonly known that an employee was a Union supporter and openly engaged in campaigning for the Union, the em-

ployer's statement to the employee that he had heard she was campaigning for the Union therefore did not give the "impression of surveillance" forbidden by § 8(a)(1) of the Act. *Southbay Daily Breeze*, 160 NLRB No. 145, 63 LRRM 1252 (1966). In this case, Yockmen had already voluntarily disclosed his position with the Union and his activities on its behalf to Daly, Farnow and Mr. Jarrett—and his flip comments to Harvey scarcely indicate that Yockmen felt any restraint or coercion whatsoever.

CONCLUSION

Based upon the meager supporting evidence recounted above, the Board has directed the Hotel Conquistador, Inc. d/b/a Hotel Tropicana, and its officers and agents to cease and desist from violating the provisions of the National Labor Relations Act in the broadest possible language. Moreover, the Company is directed to offer Frank Yockmen immediate and full reinstatement, to reimburse him for loss of earnings suffered since the date of his discharge, and to post the usual notices (R. 77-78, 53-54). The Company submits that, in light of the above, the Board was wholly unjustified in finding that the Hotel Tropicana had committed any unfair labor practices whatsoever and that its findings are clearly not supported by substantial evidence on the record considered as a whole. National Labor Relations Act

§ 10(e), 29 U.S.C. § 160(e). It is therefore respectfully contended that the Board's petition for enforcement of its order should be denied in its entirety.

Dated: February 27, 1968.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney



